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Supreme Court of the United States

OCTOBER TERM, 1962

No. 401

UNITED STATES FOR THE USE OF H. W. MOSELEY, d/b/a MOSELEY PLUMBING & HEATING COMPANY, PETITIONER,

vs.

ELECTRONIC & MISSILE FACILITIES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1962
CERTIORARI GRANTED DECEMBER 3, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Civil Action No. 1731

UNITED STATES OF AMERICA FOR THE USE OF H. W. MOSELEY d/b/a MOSELEY PLUMBING AND HEATING COMPANY,

vs.

ELECTRONIC & MISSILE FACILITIES, INC., FORMERLY, FIVE BORO CONSTRUCTION CORPORATION, AND CONTINENTAL CASUALTY CO.

To the District Court of the United States for the Middle District of Georgia, Macon Division:

COMPLAINT—Filed February 24, 1961

The petition of the United States of America for the use of H. W. Moseley d/b/a Moseley Plumbing and Heating Company respectfully shows:

Count I.

(1)

This action is brought under provisions of Title 40, Sections 270 (a), 270 (b) and 270 (c) of the United States Code.

(2)

Five Boro Construction Corporation was incorporated in New York, and has by charter amendments during the year, 1960, changed its name to Electronic & Missile Facilities, Inc., and its principal office and place of business is located at No. 2 Lafayette Street, New York 7, New York.

[fol. 3] (3)

Continental Casualty Co. is a corporation engaged in the surety business and is organized and existing under the laws of the State of Illinois with its principal office in Chicago, Illinois, and it is hereinafter referred to as a defendant.

(4)

H. W. Moseley, d/b/a Moseley Plumbing and Heating Company, resides in Macon, Georgia, within said judicial district, and this action is brought for his use and benefit.

(5)

On August 6, 1959, the defendant, Five Boro Construction Corporation, entered into a contract with the United States of America known as Contract No. DA-90-133-ENG-3636, for the construction of Nike Hercules facilities, R-28 and R-86 for Robins Air Force Base Defense Area, Georgia, which location is within the Middle District of Georgia.

(6)

Contemporaneously therewith, Five Boro Construction Corporation as principal and Continental Casualty Co. as surety executed a payment bond in the penal sum of $569,143.93, which bond was given in conformity with the code sections above cited and which bond provided as a condition that if the principal shall promptly make payment to all persons supplying labor and material in the [fol. 4] prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise, to remain in full force and virtue.

(7)

Thereafter, on the 18th day of August, 1959, Five Boro Construction Corporation entered into a subcontract with Moseley Plumbing and Heating Company whereby in consideration of the sum of Two Hundred Thousand Dollars

($200,000), said subcontractor agreed to furnish material and labor for plumbing, heating, sewage treatment plants, etc. A copy of said contract is hereto attached and designated as Exhibit "A".

(8)

In accordance with said contract, various Change Orders were issued by defendant from time to time providing for the doing of additional work for additional compensation so that the total amount of the contract price as increased by said Change Orders was $222,498.55.

(9)

H. W. Moseley, d/b/a Moseley Plumbing and Heating Company fully performed all the work specified in said original contract as amended by said Change Orders.

[fol. 5] (10)

In addition to the work specified in said contract and that called for by said Change Orders, H. W. Moseley, d/b/a Moseley Plumbing and Heating Company, performed additional work at defendant's direction pursuant to the contract for which he is entitled to compensation of $53,723.23.

(11)

Defendant has paid to said Moseley Plumbing & Heating Company $180,695.71, and in addition has paid to Dixie Plumbing and Supply Company $23,625.50 for materials purchased from Dixie Plumbing Supply Company by Moseley Plumbing & Heating Company in performance of said contract, making a total payment to Moseley Plumbing & Heating Company and for its benefit of $204,321.21.

(12)

Defendant is indebted to Moseley Plumbing & Heating Company for the balance of $71,900.57 which defendant fails and refuses to pay.

(13)

Said contract in the paragraph thereof designated 26, purports to provide that any controversy or claim arising out of said contract shall be determined by arbitration as therein provided but petitioner shows that said provision for arbitration is void and unenforceable and not applicable to this action because:

[fol. 6] (a) Said provision is void because it is contrary to public policy in that it is in direct violation of the express provisions of The Miller Act as contained in 41 USCA, Sec. 270 b (a) and (b) because in said Act, it is expressly provided that persons occupying the status of Moseley Plumbing & Heating Company shall have a right of action upon the payment bond when such person has not been paid in full before the expiration of a period of ninety (90) days after the day on which the last of the labor was done and materials furnished and that every suit under said Act shall be brought in the United States District Court for the District in which the contract was to be performed and executed and not elsewhere.

(b) Said contract provision is an attempt to oust the Federal District Court of this District of jurisdiction of this claim and to deprive petitioner of the benefits intended by The Miller Act.

(c) Even if it were otherwise valid, said provision is not effective to prevent maintenance of this suit for the reason that it does not purport to provide that arbitration as therein provided shall be a condition precedent to suit.

(d) Said provision, if it should be construed as requiring arbitration as a condition precedent to suit, even though it does not actually so provide, is contrary to the public policy of the State of Georgia in which said contract was made and to be performed, and is, therefore, illegal and unenforceable.

(e) Said provision is unreasonable and arbitrary and its enforcement would work a hardship upon petitioner to the [fol. 7] extent of depriving him of the rights intended to be granted by The Miller Act in that it would require

presentation of evidence before a foreign forum many hundreds of miles removed from the place where the work was performed and where petitioner's witnesses would be available; and, petitioner would not be able to compel the presence of witnesses at such distant place.

(14)

In spite of the invalidity of said arbitration provision as herein alleged, defendant, Electronic & Missile Facilities, Inc., is contending that the same is valid and has filed in the Supreme Court of the State of New York, County of New York, a purported arbitration proceeding, has procured an order from the Supreme Court of the State of New York, County of New York, purporting to set a hearing herein for February 28, 1961, and has purported to serve the same upon Moseley Plumbing & Heating Company by mail, and, unless temporarily restrained and enjoined by this Court, said defendant will proceed with said purported arbitration to the irreparable injury and damage of petitioner. A copy of said proceeding is hereto attached and designated as Exhibit "B".

(15)

Petitioner could not adequately present the facts relating to his claim against defendants in said arbitration proceedings because compulsory process to require the presence of witnesses from the Middle District of Georgia in the Supreme Court of the State of New York, more than seven hundred miles from the Middle District of Georgia would not be available.

[fol. 8] (16)

The Miller Act requires that a suit thereunder be commenced within one year after the date on which the last of the labor was performed or material was supplied and all of petitioner's rights under said Act would be lost if he participated in arbitration proceedings and the same were not concluded within one year from the date when the last work was performed or materials supplied by petitioner.

(17)

This action is brought more than ninety (90) days but less than one year after the last work was done and material furnished by petitioner.

(18)

Electronic & Missile Facilities, Inc., formerly Five Boro Construction Corporation has designated as its agent for service in Georgia, W. Charles LeShanna, with D. L. Hannum as alternate, whose address is Healey Building, Atlanta, Georgia.

(19)

Defendant, Continental Casualty Company, has designated as its agent, Ed. L. Benton, address Persons Building, Macon, Georgia.

Wherefore, petitioner prays:

(a) That summons issue directed to defendants requiring their appearance as provided by law and that petitioner [fol. 9] have judgment against defendants for amounts herein alleged to be due.

(b) That defendant, Electronic & Missile Facilities, Inc., its officers, agents and attorneys be temporarily and permanently enjoined from proceeding with purported arbitration proceedings commenced by it in the Supreme Court of the State of New York, County of New York against H. W. Moseley, d/b/a Moseley Plumbing & Heating Company.

Count II.

(1)

Petitioner adopts paragraphs 1, 2, 3, 4, 9, 13, 14, 15, 16, 17, 18 and 19 of Count I and hereby makes them effective insofar as Count II is concerned.

(2)

On August 6, 1959, the defendant, Five Boro Construction Corporation, entered into a contract with the United States

of America known as Contract No. DA-90-133-ENG-3687, for the construction of Nike Hercules facilities, TU-28 and TU-79 for Turner Air Force Base Defense Area, which is located within the Middle District of Georgia.

(3)

Contemporaneously therewith, Five Boro Construction Corporation as principal and Continental Casualty Co. as surety executed a payment bond in the penal sum of $547,442.27, which bond was given in conformity with the [fol. 10] code sections above cited and which bond provided as a condition that if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise, to remain in full force and virtue.

(4)

Thereafter, on the 18th day of August, 1959, Five Boro Construction Corporation entered into a subcontract with Moseley Plumbing and Heating Company whereby in consideration of the sum of One Hundred Ninety Thousand Dollars ($190,000), said subcontractor agreed to furnish material and labor for plumbing, heating, sewage treatment plants, etc. Copy of said contract is hereto attached designated Exhibit 2 and is made a part hereof.

(5)

In accordance with said contract, various Change Orders were issued by defendant from time to time providing for the doing of additional work for additional compensation so that the total amount of the contract price as increased by said Change Orders was $207,134.67.

(6)

In addition to the work specified in said contract and that called for by said Change Orders, H. W. Moseley,

[fol. 11] d/b/a Moseley Plumbing and Heating Company, performed additional work at defendant's direction pursuant to the contract for which he is entitled to compensation of $41,500.15.

(7)

Defendant has paid to said Moseley Plumbing & Heating Company $182,749.13, and in addition has paid to Dixie Plumbing Supply Company $20,914.99 for materials purchased from Dixie Plumbing Supply Company by Moseley Plumbing and Heating Company in performance of said contract, making a total payment to Moseley Plumbing and Heating Company and for its benefit of $203,664.12.

(8)

Defendant is indebted to Moseley Plumbing & Heating Company for the balance of $44,970.10 which defendant fails and refuses to pay.

Wherefore, Petitioner prays:

(a) That summons issue directed to defendants requiring their appearance as provided by law and that petitioner have judgment against defendants for amounts herein alleged to be due.

(b) That defendant, Electronic & Missile Facilities, Inc., its officers, agents and attorneys be temporarily and permanently enjoined from proceeding with purported arbitration proceedings commenced by it in the Supreme Court of the State of New York, County of New York against H. W. Moseley, d/b/a Moseley Plumbing & Heating Company.

[fol. 12] Count III.

(1)

Petitioner adopts as a part of this Count all of the allegations appearing in Count I in paragraphs 1, 2, 3, 4, 5, 6, and 7 thereof.

(2)

Defendant, Electronic & Missile Facilities, Inc., has been guilty of the grossest kind of misconduct, fraud, malice and oppression in its entire dealings with Moseley Plumbing and Heating Company in connection with said work and said contract in that it conceived and executed a fraudulent and illegal scheme, plan and design to perpetrate a fraud upon Moseley Plumbing and Heating Company, and other subcontractors as well, by causing said Moseley, as well as other subcontractors, to furnish materials and labor for said project with the intention on the part of said defendant of obtaining a large portion of said work and materials without paying therefor or by brow-beating Moseley and said other subcontractors into accepting much less than their real value, which said plan, scheme and design was conceived, executed and perpetrated upon Moseley in the following particulars:

(a) Said defendant contractor represented that it was a general contractor and that the work to be done by Moseley would be that which was spelled out in the typewritten part of the subcontract attached as Exhibit "A", whereas in truth and in fact, said defendant at the time well knew that they had no intention of performing the [fol. 13] proper function of a general contractor by doing substantial parts of the work itself and exercising overall coordination and supervision of the work of subcontractors, but it intended to and did subcontract substantially all of the work to various subcontractors and itself had no employees on the job except for a project superintendent and a mere handful of common laborers.

(b) In pursuance of that plan of operation, defendant contractor fraudulently and with malice inserted into its printed subcontract form provisions purporting to authorize it to require Moseley or other subcontractors to do any work whatever which they were directed by said defendant to do regardless of whether it bore any proper relation to the work called for in the main typewritten portion of such subcontract, which provisions, if they had been in good faith applied to the main work undertaken to be

performed by Moseley would have been a proper subject of contract between the parties, but said provisions were inserted by defendant with the specific malicious intent of using those provisions to give color to and to act as a spacious cover for directives to do work in no way connected with the plumbing and heating called for by Moseley's subcontract and with the intention of avoiding payment therefor under the false and fraudulent contention that said work was so covered by such subcontract and with the intention, if it could not get Moseley to accept said work as a part of his subcontract, to get him to accept a greatly reduced amount of compensation in order to avoid litigation and to obtain money with which to pay his creditors.

(c) In furtherance of said illegal scheme, defendant gave Moseley numerous work directives during the course [fol. 14] of the work contending at the time and contending now that the work called for in such directives was covered by Moseley's subcontract, whereas in truth and in fact, said defendant knew such work was not so covered and was acting in bad faith and maliciously in issuing such directives and in so contending. Said defendant's bad faith in this connection was so great that it discharged from its employ its project superintendent who attempted to be honest and agreed with Moseley and other subcontractors in similar positions that work called for by such directives was not covered by his contract and that he should receive additional compensation therefor.

(d) In furtherance of said fraudulent and illegal plan and scheme, said defendant issued a large number of said work directives so as to greatly increase the amount of work to be done by Moseley and to increase his capital outlay in the performance of the job and in conjunction therewith said defendant withheld payments to which Moseley was entitled with the express purpose and intent of producing financial pressure upon Moseley with the intention of forcing Moseley to settle with them for a price far below the real value of such additional work and materials so as to relieve the financial stress and embarrassment intentionally produced by said defendant.

(e) The scheme of producing financial pressure which defendant applied to Moseley as alleged in the foregoing subparagraph was a general overall scheme, plan and design of said defendant in the entire operation of the contract which it applied to all of its subcontractors in order to squeeze profits for itself from the financial sacrifices it [fol. 15] was attempting to cause said subcontractors to make, and said plan was carried to complete fruition both with respect to Moseley and every other subcontractor who dealt with said defendant, practically all, if not all of said subcontractors becoming insolvent by the time said project was completed.

(f) Said defendant conceived and carried out a further plan and practice of making so called back charges against each of its subcontractors and particularly Moseley by which defendant billed such subcontractors with enormous and outrageous charges for work allegedly covered by such subcontractors' subcontract and allegedly done by defendant—when in truth and in fact, defendant knew that the work represented by said alleged back charges was not a proper part of the work required under such subcontract but said charges were made maliciously in an effort to reduce the amount of compensation to which the subcontractor was legitimately entitled. As a part of said plan, said defendant attempted to charge to Moseley and to each of the subcontractors the alleged cost of doing various work not covered by any subcontract, but which was plainly required to be performed by said general contractor and in such instances, said defendant allegedly prorated the cost of such work among all the subcontractors but petitioner alleges that in fact said defendant actually charged substantially all of such costs to each of said subcontractors. In addition, said defendant attempted to charge to Moseley the cost of work performed by other subcontractors and clearly covered by the contracts of such other subcontractors and clearly not covered by Moseley's subcontract.

[fol. 16] (g) The provisions in said subcontract purporting to require an arbitration of any claim or dispute in the State of New York was maliciously inserted in said

contract in furtherance of the express purpose of defendant to obtain work and materials without paying therefor with the intention on the part of said defendant of causing a purported arbitration of all such claims in the State of New York at least seven hundred miles distant from the Middle District of Georgia where it knew and intended that Moseley and other subcontractors could not properly appear and present their evidence and claims because of the impossibility of compelling the attendance of witnesses at such great distance and because of being unable financially to do so because of the financial stress intentionally produced by defendant, all with the intention of having allowed in favor of said defendant in such proceeding all of the false and fraudulent claims of defendant that extra work done by Moseley and other subcontractors was covered by their subcontracts when in fact it was not, and of having allowed their false and fraudulent back charges against Moseley and other such subcontractors as hereinbefore alleged, all with the intention of defeating the right of Moseley and other subcontractors to have its legitimate claims litigated in this Honorable Court as expressly provided by the terms of the Miller Act.

(3)

Because of the fraud, oppression, malice and bad faith of said defendant which permeated the entire contract relations between Moseley and said defendant from the inception of the contract through to the completion of the performance thereunder, said defendant is not entitled to [fol. 17] assert in this Court a contract so fraudulently entered into and executed by it, but Moseley is entitled to rescind the contract and all of its obnoxious provisions and to recover in this suit the fair and reasonable value of all of the work performed and materials furnished by him, less payments which have been previously made by defendant.

(4)

The fair and reasonable value of the work performed and materials furnished by Moseley was $300,000.00. Said

defendant has paid to Moseley and on his behalf the sum of $204,321.21 and said defendant and defendant, Continental Casualty Company, are indebted to Moseley for the balance of $95,678.79.

(5)

Because of its misconduct, fraud, malice and oppression herein alleged, defendant, Electronic & Missile Facilities, Inc., is liable to petitioner for punitive damages to deter said defendant from such reprehensible conduct in the future and petitioner alleges such punitive damages to be $100,000.00.

(6)

Petitioner adopts as a part of this Count all of the allegations appearing in Count I in paragraphs 13-19 thereof.

Wherefore, petitioner prays:

(a) That summons issue directed to defendants requiring their appearance as provided by law.

[fol. 18] (b) That petitioner have judgment against each of the defendants in the sum of $95,678.79.

(c) That in addition, petitioner have judgment against defendant, Electronic & Missile Facilities, Inc. in the sum of One Hundred Thousand Dollars ($100,000.00) as punitive damages.

(d) That defendant, Electronic & Missile Facilities, Inc., its officers, agents and attorneys be temporarily and permanently enjoined from proceeding with purported arbitration proceedings commenced by it in the Supreme Court of the State of New York, County of New York, against H. W. Moseley, d/b/a Moseley Plumbing and Heating Company.

Count IV.

(1)

Petitioner adopts as a part of this Count all of the allegations of Count I appearing in paragraphs 1, 2, 3, and 4 thereof.

(2)

Petitioner adopts as a part of this Count all of the allegations of Count II appearing as paragraphs 2, 3, and 4 thereof.

(3)

Petitioner adopts as a part of this Count all of the allegations of Count III appearing as paragraphs 2 and 3 thereof.

[fol. 19]

(4)

The fair and reasonable value of the work performed and materials furnished by Moseley was Three Hundred Thousand Dollars ($300,000.00). Said defendant has paid to Moseley and on his behalf the sum of $203,664.12, and said defendant and defendant, Continental Casualty Co. are indebted to Moseley for the balance of $96,335.88.

(5)

Petitioner adopts as a part of this Count, the allegations of Count III appearing in paragraph 5 thereof.

(6)

Petitioner adopts as a part of this Count all of the allegations of Count I appearing in paragraphs 13-19 thereof.

Wherefore, petitioner prays:

(a) That summons issue directed to defendants requiring their appearance as provided by law.

(b) That petitioner have judgment against each of the defendants in the sum of $96,335.88.

(c) That in addition, thereto, petitioner have judgment against defendant, Electronic & Missile Facilities, Inc. in the sum of One Hundred Thousand Dollars ($100,000.00) as punitive damages.

(d) That defendant, Electronic & Missile Facilities, Inc., its officers, agents and attorneys be temporarily and per-

[fol. 20] manently enjoined from proceeding with purported arbitration proceedings commenced by it in the Supreme Court of the State of New York, County of New York against H. W. Moseley, d/b/a Moseley Plumbing and Heating Company.

Count V.

(1)

Petitioner adopts as a part of this Count, all of the allegations of Count I appearing in paragraphs 1, 2, 3, 4, 5, 6 and 7 thereof.

(2)

Petitioner adopts as a part of this Count, all of the allegations appearing in Count III in paragraphs 2 and 3 thereof.

(3)

Petitioner adopts as a part of this Count all of the allegations of Count I appearing in paragraphs 13-19 thereof.

(4)

Even if Moseley is not entitled to a rescission of said contract because of the facts herein alleged, he is entitled to be compensated for the fair and reasonable value of the work performed and materials furnished by him, less any legitimate damage sustained by defendant, if any, for the reason that all of said work and materials were accepted [fol. 21] by said defendant contractor and the benefits thereof retained by said defendant in that it has been paid therefor by the United States of America under its contract, and nevertheless fails and refuses to account to and pay Moseley therefor.

(5)

Moseley has not been guilty of any substantial breach of his subcontract, but even if he has breached it in any respect, which petitioner denies, defendant has not suffered any damage by reason thereof.

(6)

Petitioner adopts as a part of this Count all of the allegations of Count III appearing in paragraphs 4 and 5 thereof.

(7)

Petitioner adopts as the prayer of this Count all of the prayers of Count III.

Count VI.

(1)

Petitioner adopts as a part of this Count all of the allegations of Count I appearing in paragraphs 1, 2, 3, and 4 thereof.

(2)

Petitioner adopts as a part of this Count all of the allegations of Count II appearing in paragraphs 2, 3, and 4 thereof.

[fol. 22]

(3)

Petitioner adopts as a part of this Count all of the allegations of Count III appearing in paragraphs 2 and 3 thereof.

(4)

Petitioner adopts as a part of this Count all of the allegations of Count I appearing in paragraphs 13-19 thereof.

(5)

Petitioner adopts as a part of this Count all of the allegations of Count V appearing in paragraphs 4 and 5 thereof.

(6)

Petitioner adopts as a part of this Count all of the allegations of Count IV appearing in paragraph 4 thereof.

(7)

Petitioner adopts as a part of this Count all of the allegations of Count III appearing in paragraph 5 thereof.

[fol. 23] (8)

Petitioner adopts as the prayers of this Count all of the prayers of Count IV.

T. BALDWIN MARTIN,
(T. Baldwin Martin),

GEORGE C. GRANT,
(George C. Grant).

Of Counsel:

MARTIN, SNOW, GRANT & NAPIER,
403 First National Bank Building,
Macon, Georgia.

EXHIBIT A TO COMPLAINT

* * * * * * *

[fol. 67] Agreement made the 18 day of August, 1959, by and between Five Boro Construction Corp., a New York corporation, having its principal place of business at 2 Lafayette Street, City of New York, State of New York, hereinafter called the "Contractor," and Moseley Plumbing & Heating Company a ..... corporation, partnership, joint venture, firm having its principal place of business at 2764 Montpelier Avenue, City of Macon, State of Georgia, hereinafter called the "Subcontractor."

Witnesseth:

Whereas, the Contractor heretofore entered into contract No. DA-09 133-ENG-3686 dated the 9 day of August, 1959 with The Corps of Engineers, U. S. Army Savannah District, hereinafter called the "Owner" for the construction of Nike-Hercules Facilities R-28 and R-88, Robins Air Force Base Defense Area, Georgia, and which contract,

for all purposes under this agreement includes the advertisement for bids, instructions to bidders addenda, the Contractor's proposal as accepted by the Owner, the form of contract, general conditions, special conditions, specifications, drawings, plans and revisions thereof and amendments to any of the foregoing, all of which documents in their entirety are hereinafter called the "principal contract" and which construction to be completed under the principal contract is hereinafter called the "project", and

Whereas, all documents comprising the principal contract are on file in the Contractor's office, and the Subcontractor represents that he has read, examined and understands [fol. 68] them fully and completely, and

Whereas, said principal contract makes time of the essence and penalizes the Contractor for delay, and

Whereas, the Subcontractor represents that he has personally inspected, or caused to be inspected, the site of said project including the land, buildings thereon, and the vegetation on or adjacent to the site and has examined same with particular regard to the work required to be furnished under this subcontract, and

Whereas, in addition thereto, the Subcontractor represents that he has satisfied himself as to the nature and location of the work contracted for hereunder, the general and local conditions, particularly those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads, weather conditions, river stages, or similar physical conditions, the conformation and condition of the ground, the character of equipment and facilities needed preliminary to and during prosecution of the work, possibility and probability of increases in the cost of materials and wage rates and all other matters upon which information is reasonably obtainable, and which in any way can affect the work under this subcontract, or the cost thereof,

Now, Therefore, for and in consideration of the mutual covenants, conditions and promises herein contained by each of the parties hereto to be kept and performed, it is agreed as follows:

[fol. 69] The Work:

First: The Subcontractor agrees to furnish all plant, labor, materials, appliances, equipment, supervision, and all other facilities and things necessary to complete all work specified by the subdivisions and/or items of work described in the principal contract between the Contractor and the Owner and scheduled hereinbelow and agrees to perform all of said work by qualified careful, and efficient mechanics in the best and most workmanlike manner and in exact accordance with the terms, provisions and conditions of said principal contract, and the Contractor hereby sublets said work to the Subcontractor on the terms and conditions hereinafter set forth:

Description of Work.

All Plumbing, Heating, Installation of Sewage Treatment Plants, Air Conditioning, Ventilating, Installation of Government Furnished Generator Units, Supply Lines, Waterpump House, Sewers, and Storm Drainage Work Required under the Principal Contract Including without Limitation:

(a) All work set forth in Section No. 30 titled "Plumbing, General Purpose", Section No. 31 titled "Heating Systems Steam, Oil-Fired", Section No. 32 titled "Heating System; Forced Hot-Water, Oil Fired" Section 33 titled "Heating System, Forced Warm-Air; Oil-Fired Furnace (Less than 650,000 B.T.U. Capacity)," Section No. 34 titled "Air Conditioning System (For Military Construction)", Section No. 35 titled "Ventilating System, Mechanical", Section No. 37 titled "Installation of Government-Fur-
[fol. 70] nished Engine Generator Units", Section No. 51 titled "Supply Lines and Distribution System", Section No. 53 titled "Water Pump House", Section No. 54 titled "Sewers, Sanitary, Gravity", and Section No. 62 titled "Storm Drainage".

(b) Accepting delivery when made, pay all demurrage incurred, unload, transporting, storing and installing all Government furnished Engine Generator Sets and Control Panels, including flexible connections and mufflers.

(c) All excavation, trenching and backfilling for all work required hereunder as set forth in Section No. 50 titled "Excavation, Trenching and Backfilling for Utilities Systems" and as set forth in all other sections of the specifications.

(d) Final mechanical connections of all equipment furnished under all Sections of the specifications.

(e) Accept delivery when made, all demurrage incurred, unload, transport, store and install sewage treatment plants furnished under Section No. 55 titled "Sewage Treatment Plants" by other Subcontractors.

(f) Furnishing and installing all fire hose racks, and hoods wheresoever set forth in the principal contract.

(g) All such work set forth in the plans, specifications and other documents comprising the principal contract, which is directly relating to this contract agreement.

[fol. 71] And in Addition Thereto, Subcontractor will furnish and deliver to job site all required pumps for temporary water.

Changes and alterations to this contract agreement are listed on a supplemental page which is attached hereto and is to become a part of this contract as though contained integrally therein.

Notwithstanding the foregoing scheduled work, the Subcontractor expressly agrees that wherever the principal contract requires performance of any act, thing, or work by the Contractor or imposes any obligation on the Contractor in connection with performance or completion of any work, whether set forth in the above specified subdivisions or/or items of work in the principal contract, or set forth in other subdivisions and/or items of work in said principal contract, or specified under work described for other trades in said principal contract but which is within the sphere of operations of the Subcontractor's trade or is customarily performed by the Subcontractor's trade, then such obligation of the Contractor is hereby assumed by the Subcontractor to be part of the work scheduled hereunder and the Subcontractor expressly agrees to perform all work

entailed thereby at no additional cost; it being the intention of the parties that every part of said principal contract is made a part hereof as though fully set forth in length herein. The Subcontractor agrees that he is bound by all terms, provisions, general conditions and special conditions of the principal contract insofar as his work is concerned to the same extent and to all intents and purposes as though the Subcontractor were the Contractor save only [fol. 72] as modified by this subcontract and, further agrees, that the Contractor has the same rights and privileges with respect to the work to be performed hereunder as the Owner has under the principal contract. In the event, however, that there is a conflict between the terms, provisions and conditions of this subcontract with any terms, provisions and conditions of the principal contract, it is agreed by the parties hereto that the terms, provisions and conditions of this subcontract will prevail.

Performance:

Second: The Subcontractor will perform the said work in a prompt and diligent manner and agrees to commence the several parts thereof at such times and in such order as the Contractor may direct, and shall finish the several parts and the whole of said work at such times, in conjunction with work of other trades engaged on the project, as will insure the uninterrupted progress of the entire work. The Subcontractor agrees that the Contractor shall have the right to exercise overall supervision and control over work to be done by the Subcontractor, and that direction of the Contractor as to the time when work of the Subcontractor shall begin and the manner in which it shall be progressed in connection with other work involved in said project shall be fully and promptly complied with but such overall supervision and control shall not in any way limit the obligations of the Subcontractor to directly supervise and control his work. In that regard, the Subcontractor agrees to have present at the project site at all times a representative who shall have authority to act for him in all matters concerning the work. In the absence of such [fol. 73] representative, Subcontractor hereby requests and

authorizes the Contractor to accept shipments of his materials, supplies, equipment, etc., and to store same at the site, Subcontractor hereby assuming all risk of shortages, loss or damage thereto and costs thereof and relieving Contractor of any responsibility therefor. The intention of the parties is that work undertaken hereunder will be conducted under the general direction of the Contractor and/or Owner and that it is subject to inspection by the Contractor and/or Owner's inspectors who may enforce strict compliance with the terms of this subcontract.

Third: The Subcontractor shall man the job and shall keep the job adequately supplied with materials at all times to the complete satisfaction of the Contractor. In that regard the Subcontractor shall furnish sufficient labor and supervisory forces, construction plant, and suitable materials and equipment and shall work such hours as directed by the Contractor, including night shifts, overtime, Saturdays, Sundays, and Holidays without additional cost to the Contractor as may be necessary to insure prosecution and completion of the work in a skillful and expeditious manner within the time limitations of the principal contract, as modified by work directives of the Contractor. During performance of the work, the Subcontractor shall not employ men or means or use materials or manufactured products which may cause strikes, stoppages or similar troubles or will, in the opinion of the Contractor, hinder, interfere with, or delay prosecution of the work of the Contractor or any other subcontractor employed on the project. All materials covered by this subcontract are to be of the most suitable grade of their respective kind for the purpose intended. [fol. 74] The Contractor, from time to time, may request the Subcontractor to provide additional men or increase the supply of materials at the job, in either event the Subcontractor agrees to comply with any such request within 24 hours thereafter or, with respect to materials, as soon thereafter as is possible, and the Subcontractor's failure to comply shall constitute a default as hereinafter defined. In the event the Contractor deems an employee of the Subcontractor incompetent, careless, insubordinate or otherwise objectionable, the Subcontractor shall dismiss and remove such employee from the project.

Fourth: The Subcontractor shall not commence work hereunder, or once started continue same, until he has complied with the requirements of the principal contract with regard to insurance, accident prevention, licenses, patents, progress charts, changed conditions, samples and descriptive data, labor report, safety and security measures, rates of wages, the eight-hour law, non-rebate of wages non-discrimination, the Buy American Act, overtime compensation, convict labor, apprentices, withholding of funds to assure wage payments, payroll records, the Davis-Bacon Act, the Copeland Act, termination of subcontracts, and any and all other matters required by the principal contract, and pertinent laws and regulations, and acts amendatory thereto.

Fifth: The Subcontractor shall keep the construction area, including storage areas used by him, at all times free from his rubbish, waste material and debris, and prior to completion of work shall remove from the site any such rubbish, waste material, and debris, as well as any tools, scaffolding, equipment and material used by him and not incorporated [fol. 75] into the completed work, leaving his work "broom clean" and free and clear of all obstructions and hindrance. In the event of the Subcontractor's failure to so remove such rubbish, waste materials, etc. after 24 hours notice the Contractor shall have the right to remove same and charge the cost thereof against moneys due or to become due the Subcontractor.

Sixth: The Subcontractor hereby assumes responsibility for and shall verify all measurements, lines, grades, dimensions, layouts, colors, qualities, quantities, etc. insofar as same are pertinent to the work to be performed by him hereunder. If the Contractor shall furnish any basic reference lines and bench marks to the Subcontractor, such basic reference lines and bench marks must be used by the Subcontractor and the finished work shall agree therewith.

Seventh: The Subcontractor agrees that he will be responsible for tools of his employees and his own tools, materials and equipment on the job, and that in no event shall the Contractor and/or Owner be liable to the Sub-

contractor for loss of, pilferage, or damage to tools, materials, and equipment used by him or his employees.

Eighth: The Subcontractor shall be responsible for all cutting, removal, patching and clearing; openings, channels, chases, flues, sleeves, inserts, hangers, guards rails, night lights barricades, pumping, and temporary heat water and electricity, and hoists, scaffolds, runways and cleanup which may be necessary in performance of his work hereunder. The Subcontractor shall also be responsible for correct performance of his own work and any errors therein shall [fol. 76] be corrected at the Subcontractor's own cost and expense and, in addition thereto, the Subcontractor shall indemnify the Contractor for any costs or expenses attributable to errors in performance by the Subcontractor.

Ninth: The Subcontractor agrees to handle, transport and install at his own cost and expense, all property, supplies, materials and equipment furnished by the Contractor and/or Owner for use on the project but only insofar as same applies to work subcontracted hereunder. In addition thereto, the Subcontractor agrees that if he uses Contractor and/or Owner furnished property, supplies, materials or equipment in performing the work, he will allow the Contractor credit against any payments to be made to him hereunder equal to market value of said property, supplies, materials and/or market rental of said equipment. The Subcontractor at all times, shall protect and preserve all such property, etc., as well as all of his work performed or in process of completion, and requests of the Contractor to enclose or otherwise protect such property, etc., and work shall be complied with. If as determined by the Contractor, the Subcontractor does not adequately protect such property, etc. and work, then same may be protected by the Contractor and the cost thereof may be charged to the Subcontractor or deducted from any payments due or to become due him.

Tenth: In accordance with provisions of the principal contract, the Contractor from time to time will prepare and furnish progress schedules to the Owner. It is expressly agreed between the Contractor and the Subcontractor that such progress schedules are not intended to be and

shall not be construed as a representation of the actual [fol. 77] time or sequence of work. The Contractor at all times reserves the right to alter and modify such progress schedules in determining and coordinating the progress of the Subcontractor's work.

Eleventh: The Subcontractor shall furnish within 48 hours after written or oral request by the Contractor any number of samples of materials, prints of his shop drawings, payrolls, material schedule, reports, affidavits or any other written or physical data that may be necessary, in the opinion of the Contractor, for proper prosecution for the work and/or necessary to comply with the provisions of the principal contract. The Subcontractor agrees that the cost thereof, and the cost of any prints of the Architects' and/or Engineer's plans and specifications required by the Subcontractor, shall be paid for by the Subcontractor. In that regard, it shall not be incumbent upon the Contractor to discover any mistakes, errors, omissions or deviations from the contract requirements in the quality or kind of materials used by the Subcontractor or in the shop drawings, schedules and reports submitted by the Subcontractor and the Contractor's Architect's Engineer's and/or Owner's approval of same shall not relieve the Subcontractor from responsibility for unauthorized changes, deviations, omissions or for errors of any sort therein. Authority for a change, deviation or omission from the requirements of this subcontract shall be obtained in the same manner and by following the same procedure established herein for approval of claimed extra work.

Twelfth: In case of discrepancy or a difference between any figures, drawings, or specifications, the matter shall be immediately submitted in writing to the Contractor, [fol. 78] whose decision shall be final and conclusive, and without whose decision said discrepancy or difference shall not be adjusted by the Subcontractor, save only at his own risk and expense.

Insurance:

Thirteenth: (a) The Subcontractor shall secure and maintain fire insurance with extended coverage and Build-

er's Risk indorsement, payable to the Contractor, insuring all of his work in place and materials stored at the site. In the event of loss or damage to which such insurance is applicable, the Subcontractor agrees to be and remain liable for replacement to its original condition of such portion of the Subcontractor's work as may be damaged, which replacement shall be in accordance with the provisions of this subcontract and payment for which shall be negotiated but in any event shall not exceed such sum or sums paid to the Contractor by the fire insurance carrier on account of loss or damage to work performed by the Subcontractor.

(b) In order to protect the Contractor and/or Owner further, the Subcontractor agrees to obtain Public Liability Insurance with hold harmless indorsement in accord with the obligation set forth in Paragraph Twenty-first hereof with limits of 100/300,000 and Property Damage Insurance, including risks of explosion, collapse and damage to underground structures, with limits of 50/100,000. The Subcontractor agrees to pay the total cost of such insurance.

(c) The Subcontractor shall provide and keep in force Workmen's Compensation Insurance in accordance with [fol. 79] the requirements of the principal contract and/or applicable State Law or other constituted authority and shall provide evidence of such coverage to the Contractor.

(d) Before commencing work at the site, the Subcontractor agrees to furnish a Contractors' protective liability and property damage insurance policy to protect the Contractor and/or Owner against claims arising from the operations of the Subcontractor and his subcontractors.

(e) The Subcontractor shall provide and keep in force Vehicular Liability Bodily Injury Insurance in limits of 100/300,000 and Vehicular Liability Property Damage in single limit of $10,000.00 with respect to all vehicles which may be operated on the site of the work by the Subcontractor, its subcontractors, suppliers, agents, servants or employees.

(f) Before commencing work, the Subcontractor shall evidence compliance with the foregoing provisions by delivering to the Contractor certificates of such insurance

and/or copies of such policies indicating the premiums therefor have been paid. Each policy and certificate shall provide that there shall be no cancellation or change in coverage until after at least ten (10) days prior written notice to the Contractor in at least five (5) days before expiration of any such coverage, renewal thereof with similar coverage shall be provided by the Subcontractor for at least an additional one year term and such evidence thereof as the Contractor may request shall be furnished.

[fol. 80] (g) Failure of the Subcontractor to effect any coverage required by this paragraph shall constitute a default hereunder and, in addition thereto, the Contractor may, at its option, effect such insurance on behalf of the Subcontractor. With respect to coverage effected by the Contractor, the Contractor shall not be responsible for the solvency of the carrier or the carrier's willingness to pay.

(h) Whenever the Contractor effects insurance on behalf of the Subcontractor and the Subcontractor fails to pay the Contractor for same within 48 hours after written or oral demand therefor, the Subcontractor hereby authorizes the Contractor to deduct the cost of same from any sums due or to become due the Subcontractor hereunder.

(i) The Subcontractor agrees that nothing herein shall be deemed to relieve him from any responsibility or obligation under this subcontract, nor shall anything herein be deemed a relinquishment, waiver or assumption by the Contractor of any such responsibility or obligation.

Other Trades:

Fourteenth: The Subcontractor understands that the Contractor has work under the principal contract which is not subcontracted hereunder, and that, in addition thereto, the Owner may award other contracts for additional work at the project site and hereby agrees to cooperate fully with the Contractor and/or such other contractors or subcontractors as are doing work on the job site so as not to interfere with performance by them or any of them. Before [fol. 81] proceeding with the work under this subcontract, the Subcontractor agrees to accurately check all previous

and surrounding work done by other trades insofar as same affects the work subcontracted hereunder and to determine the correctness of same, and failure on his part to detect or report discrepancies, before proceeding with his own work, will relieve the Contractor of any and all claims by the Subcontractor to recover cost, expense or damage resulting therefrom. In addition thereto, the Subcontractor agrees to request shop details, drawings, layouts, etc. of work of other trades abutting, connecting to, adjacent to contiguous with or in any way affecting the work of the Subcontractor and to carefully fit, conform and coordinate the work undertaken hereunder with that of such other trades so that the work of all shall be coordinated. In the event of the failure for any reason of the Subcontractor and such other trades to agree as to the extent of cooperation or the extent of work to be done by any or either, in order to insure proper completion of items of contiguous work, and/or to insure performance of their respective subcontracts, such disagreement shall be determined by the Contractor whose decision shall be final and conclusive. In the event the Subcontractor sustains damage or loss through any delay, default, act or omission of any other subcontractor and/or other contractors, their servants, agents or employees, the Subcontractor understands and agrees that the Contractor shall not be liable therefor inasmuch as the Contractor does not assume any responsibility for actions or omissions of other subcontractors and/or contractors but nothing herein contained shall be construed to limit the Subcontractor from pursuing his legal remedies against any such offending party. In that regard, the Subcontractor [fol. 82] shall have no claim against the Contractor for such damage, but shall have the right to recover such damage from the offending party under the provision similar to this provision which has been or will be inserted in contracts with other subcontractors of the Contractor. If the Subcontractor hinders or delays or damages the work of any other Subcontractor and/or other Contractor, he agrees to be directly responsible to such others for any damages they may suffer as a result of the manner in which he executes the work.

Disputes:

Fifteenth: If, in connection with any work directed to be performed or material directed to be furnished under this subcontract, the Subcontractor shall dispute the direction of the Contractor, then and in such event, the Subcontractor agrees to perform same and will file with the Contractor a statement of his claim in exact accordance with the procedure relating to extra work hereinafter set forth.

Extra Work:

Sixteenth: (a) Minor variations in the underlying work, where such variations are in accordance with good construction practice, shall be approved and performed by the Subcontractor at no additional cost to the Contractor.

(b) The Contractor may at times issue written orders to the Subcontractor making changes in, adding to or subtracting from work to be performed hereunder. The Subcontractor shall not deviate from, add to, delete from or [fol. 83] make changes in the work required to be performed hereunder unless so directed by prior written order of the Contractor signed by its project manager. Upon receipt of a written order from the Contractor signed by its project manager, making changes in or adding to said work, or a direction to proceed with disputed work pursuant to Paragraph Fifteenth hereof, the Subcontractor shall promptly and in any event within 48 hours thereafter, notify the Contractor in writing if the Subcontractor claims that such order entitles him to additional compensation or extension of time for performance stating the results for same and furnishing a detailed breakdown of the estimated increased costs and/or time. Upon receipt of a written order from the Contractor signed by its project manager, subtracting from or deleting work undertaken hereunder, the Subcontractor shall promptly and in any event within 48 hours thereafter notify the Contractor in writing the amount of credit which he estimates the Contractor should receive by reason thereof setting forth a detailed breakdown of the costs estimated for such deleted work. For the purpose of checking such claim or credit, as the case may

be, the Subcontractor shall and hereby agrees to produce any and all data which the Contractor may request for the purpose of determining the correctness of the claim or credit, including time sheets, payrolls, foremen's reports, daily reports, bills and vouchers of material suppliers and subcontractors, receiving documents, freight and trucking receipts, etc., and for the purpose of checking all of such data, shall permit the Contractor to audit his books and to check directly with all suppliers of labor and material. The Contractor and Subcontractor shall negotiate and endeavor to agree in writing to any change in time of per- [fol. 84] formance or in the amount to be paid or the credit to be allowed under this agreement. In the event the Subcontractor and Contractor are unable to agree, the Subcontractor nevertheless shall and hereby agrees to proceed with performance as ordered and the question of change in the amount to be paid or time of performance shall be submitted in form and manner and within such time as will enable the Contractor to make timely claim therefor from the Owner as prescribed for the presentation of such claims or disputes in the principal contract. If the Owner allows an extension of time to the Contractor on account of such claim, the Contractor shall allow an equivalent time extension to the Subcontractor. If the Owner allows additional compensation to the Contractor on account of such claim the Subcontractor shall be entitled to receive such amount of the additional compensation as pertains to the work performed by the Subcontractor, less such part thereof as represents the Contractor's overhead and profit, which the Subcontractor hereby agrees to accept in full payment of his claim. In the event, however, that the Contractor receives no additional compensation or extension of time in connection with said claim, then the Subcontractor agrees that he shall not be entitled to receive additional compensation or extension of time from the Contractor. In the event the Owner reduces the compensation to the Contractor or reduces the time of performance in connection with any change deducting from or deleting work, the Subcontractor agrees that the entire amount of such deduction in compensation and reduction in time shall be applicable to this subcontract and that the subcontract price and time are

reduced accordingly. No upward adjustment of compensation shall be paid to the Subcontractor unless and until the [fol. 85] Contractor shall be paid by the Owner against the claim. In the event the Owner determines the claim is not one that is covered by the principal contract, then the question of change in the amount to be paid or time of performance shall be submitted to arbitration in the manner provided herein. If no additional time or compensation is requested by the Subcontractor in writing within 48 hours after receipt of a particular order from the Contractor making changes in or adding to work, or after a dispute as to work included within this subcontract, it shall be construed that there is no additional time or compensation requested or required and that the order will be fully complied with and/or work performed by the Subcontractor without any extension of time or additional compensation, but failure of the Subcontractor to notify the Contractor in writing of the estimated credit to be given within 48 hours after receipt of an order deleting or subtracting work shall and hereby is authority from the Subcontractor to the Contractor to estimate the credit to be taken and to deduct to the amount so determined from moneys due or to become due the Subcontractor hereunder.

(c) The Subcontractor shall not be entitled to receive any extra compensation for changes in work or extra work of any kind whatsoever, actually performed even though same is ordered by the Contractor or any of its representatives unless such order is in writing signed by the project manager of the Contractor, and the Subcontractor specifically agrees that he will make no claim therefor regardless of any written or verbal protests or claims by the Subcontractor prior to, during or after performance of such work or the fact that the Contractor and/or Owner accept same, [fol. 86] and he hereby waives additional compensation for any such changed or extra work actually performed by him.

(d) Any findings, agreement, determination or decision which may be made as between the Contractor and the Owner, shall be binding on the Subcontractor, and in any dispute or question arising between the parties hereto, shall be determinative of the same insofar as and to the extent

that said findings, agreement, determination or decision concerns the same matter or matters in dispute or in question between the parties hereto except that such part of any finding, agreement, determination or decision as involves compensation from the Owner to the Contractor shall only be binding upon the parties hereto to the extent provided hereinabove.

Payment:

Seventeenth: For the full, complete and proper performance of all of his obligations under this agreement, the Subcontractor shall receive the sum of Two Hundred Thousand and No Cents ($200,000.00) Dollars * * * subject to authorized additions, deductions or adjustments as herein provided, payable as herein below set forth. All payments made to the Subcontractor by the Contractor under this agreement shall constitute a trust fund in the hands of the Subcontractor for the benefit of all persons, firms or corporations having performed work or labor, supplied services, or supplied materials or equipment for the Subcontractor and for the benefit of Federal, State and City tax authorities in connection with his obligations under this agreement, and the Subcontractor agrees that no [fol. 87] such payment or any part thereof shall be diverted to or used by the Subcontractor for any other purpose until all such claims have been fully paid. The foregoing payments are hereby specifically conditioned upon the following:

(a) Partial payments for or on account of work performed will be made by the Contractor to the Subcontractor as the work progresses, not oftener than once in any calendar month, on estimates to be made by the Subcontractor, which estimates may be modified by the Contractor in its discretion and as so modified shall bind the Subcontractor for the purposes of partial payment provided, always however, that the Contractor shall not be required to pay the Subcontractor for any work performed unless and until the Owner has actually paid the Contractor therefor. In making such partial payment there shall be retained 10% on the estimate, upon which partial payment

is made, until 90 days after final completion by the Subcontractor of all its obligations under this agreement and final acceptance and payment by the Owner to the Contractor for all work covered by this agreement.

(b) The Subcontractor agrees to pay promptly all Federal, State and City taxes and all amounts due any of its subcontractors, materialmen, equipment suppliers, employees or others rendering services or supplying material, labor or equipment to the Subcontractor in connection with performance of this agreement, and hereby agrees to and does indemnify the Contractor and its surety, and the Owner, from any and all damages resulting from any failure so to do and from any liens on the project, or any part [fol. 88] thereof, and the Subcontractor agrees to pay the Contractor or its surety, any amount which the Contractor or its surety may pay in consequence of the foregoing. In the event the Subcontractor shall fail to pay promptly any taxes or amounts due any of his subcontractors, materialmen, equipment suppliers, employees, or others, as aforesaid, or in the event of the existence of any claim against the Subcontractor which has given or could give rise to a lien against the project or any part thereof, the Contractor is hereby authorized and directed by the Subcontractor to pay same for the account of the Subcontractor and the Subcontractor hereby agrees to promptly pay the Contractor the amount so paid by the Contractor and/or the Contractor may at its option retain out of any money then due or thereafter to become due to the Subcontractor an amount sufficient, in the opinion of the Contractor, to satisfy said claim or lien, and if the amount due to the Subcontractor, shall be insufficient to satisfy the said claim or lien then the Subcontractor agrees to pay the deficiency forthwith to the Contractor.

(c) All applications for progress payments shall be made on forms furnished or approved by the Contractor.

(d) The Subcontractor shall furnish as part of each application for partial and final payment the following: (a) two copies of each payroll for the pay period covered by the application for payment with proof of payment and a

"kickback" affidavit on the form furnished or approved by the Contractor attached; (b) two copies of a material delivery schedule showing each invoice by number, date, [fol. 89] vendor and actual delivery date of all material, services, supplies, appliances and equipment used in performance of this subcontract for the period covered by the application for payment, attached to which shall be an affidavit in the form furnished or approved by the Contractor; (c) a work report on the form furnished or approved by the Contractor reflecting the work performed daily in the period covered by the application for payment, and (d) any and all other forms of affidavits, certificates and data as may be required by the Contractor and/or Owner.

(e) The Subcontractor shall submit, upon demand, evidence satisfactory to the Contractor that no unpaid claims exist against him for taxes, labor, materials, service supplies, union welfare and/or benefit funds or other obligations incurred by the Subcontractor in performance of work hereunder and the Subcontractor must, as a condition precedent to any payment hereunder, submit along with the application for such payment satisfactory evidence of payment of, waivers of, and/or releases from, any and all claimants, persons, firms or corporations having performed work, labor, service or supplied materials supplies, equipment or appliances to the Subcontractor.

(f) A general release in form directed by the Contractor shall be executed and delivered by the Subcontractor in favor of the Contractor, its bonding company and Owner before final payment hereunder shall be made by the Contractor.

(g) Upon completion of the contract, the Subcontractor shall deliver the work complete and undamaged. Nevertheless, the Contractor and or Owner shall have the right [fol. 90] to take possession of or use any completed or partially completed part of the work but such possession or use shall not be deemed an acceptance of any work not completed in accord with this subcontract. In that regard, the Subcontractor agrees to furnish all guarantees for his work required by the Contractor and or Owner and will

execute such guarantees to the Contractor for the benefit of both the Contractor and the Owner. In the event that such guaranty or guarantees are to run for more than one year, the Subcontractor will, in addition, obtain appropriate bonds or guarantees if any are required in the principal contract. Such bonds must name the Contractor and Owner as beneficiaries and must be approved both as to the surety issuing the bonds and as to all terms by the Contractor and Owner before complete compliance with this obligation will be deemed to have been made.

(h) The amount of this contract shall include and therefore shall not be increased on account of any changes in the cost of any materials or labor and/or on account of existing taxes or any taxes which are now or may hereafter be imposed by Federal, State or City Governments during the life of the contract, including, but without limitation Sales and Use Taxes and Personal Property Taxes and/or on account of levies or payment that may be due or may hereafter be imposed for union, pension, welfare and/or benefit funds. The Subcontractor agrees to make provisions for and assume full liability for any and all such taxes and/or levies for State and Federal unemployment and old age benefits, taxes or levies and/or union, pension, welfare and/or benefit fund levies that shall become due and payable arising out of the employment by the Subcontractor [fol. 91] of all employees in the performance of work under this subcontract. As a condition precedent to payment of the final payment and/or retained percentage, the Subcontractor agrees to exhibit evidence satisfactory to the Contractor that all payments for such taxes, etc., have been made.

(i) All materials, supplies, appliances, etc. which have been made the basis of partial payments, as aforesaid, or have been incorporated in the work specified under this subcontract or the principal contract, shall be and become the property of the Contractor upon delivery at the project site or upon being specially adapted for use in or as part of this work, whichever may occur first, subject, however, to replacement by the Contractor at the Subcontractor's cost and expense if any such materials, supplies, appli-

ances, etc. shall be defective or unsatisfactory and the Subcontractor has failed or refused to replace any such defective or unsatisfactory materials within 48 hours after notice thereof. The Subcontractor shall furnish to the Contractor such bills of sale or other instruments of title as may be required, properly executed, acknowledged and delivered, assuring title to any such materials, supplies, appliances, etc. free of liens and/or other encumbrances and shall mark or otherwise identify all such materials, supplies, appliances, etc. as the property of the Contractor. The Subcontractor hereby warrants good title to all materials, supplies, appliances, etc. to be installed or incorporated in the work pursuant to the terms of this subcontract or the principal contract and agrees upon completion of all work to deliver possession of the premises together with all [fol. 92] improvements thereon to the Contractor free and clear of any claims, liens or charges and further agrees that neither he, nor any person, firm or corporation furnishing any materials or labor for work covered by this subcontract shall have any right to a lien upon the premises or any improvements or appurtenances thereon. In the event of a breach by the Subcontractor of this covenant against a lien, and a lien is nevertheless filed by any material man, supplier or by labor, then the Subcontractor hereby agrees to bond said lien within 24 hours after same is filed and to cause its discharge of record, This provision shall not be construed as a waiver by the Contractor of full performance of all the terms of this agreement or to relieve the Subcontractor from the sole responsibility for all work upon which payments have been made or the restoration of any damaged work, and for all materials, supplies, appliances, etc. purchased or ordered by him, or the protection of same on the job site.

(j) It is further agreed that all salvage shall belong to the Contractor and shall be delivered by the Subcontractor to a point or points on the job site designated by the Contractor and that the Subcontractor shall have no right or claim thereto whatsoever.

Default:

Eighteenth: Should the Subcontractor, at any time refuse or neglect to supply a sufficiency of properly skilled workmen or material of the proper quality or quantity, or fail in any other respect to prosecute the work with promptness and diligence, or fail in performance of any of the covenants on his part herein contained, or if he should make a general assignment for the benefit of his [fol. 93] creditors, or shall be adjudged a bankrupt, or if a receiver should be appointed on account of his insolvency, or should the Owner determine that the Subcontractor is incompetent or undesirable and notifies the Contractor to cancel this subcontract, in accordance with the provisions of the principal contract, the Contractor may, at its option, (1) terminate this subcontract and the employment of the Subcontractor hereunder by giving one-days' written notice to that effect to the Subcontractor in which event the Subcontractor shall remain liable to the Contractor for the difference between the unpaid balance of the amount to be paid under this subcontract and the cost of completing the work scheduled under this subcontract plus any and all damages incurred by reason of the Subcontractor's default; or (2) the Contractor may, after one-days' written notice to the Subcontractor, elect to provide any labor, equipment and materials and to employ any other person or persons to finish the work subcontracted hereunder, in which event, the Subcontractor shall not be entitled to receive any further payment under this subcontract until the said work shall be fully finished and accepted, at which time, if the unpaid balance of the amount to be paid under this subcontract shall exceed the expense incurred by the Contractor in finishing the work, such excess shall be paid by the Contractor to the Subcontractor, but if such expense shall exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor upon demand. Said expense so incurred by the Contractor shall include any and all damages incurred through such default of the Subcontractor. Upon termination of the employment of the Subcontractor under either of the foregoing options, the Contractor shall have the right to take possession of all

[fol. 94] tools and equipment and all materials and appliances of every kind whatsoever manufactured or fabricated for such project, whether on the project site or otherwise, and for this purpose to enter the premises of the Subcontractor.

Termination:

Nineteenth: This agreement is subject to the right of the Owner to terminate the principal contract as provided therein, in which event the provisions of the termination article of the principal contract shall become operative as if set forth herein at length and the Contractor shall have the same rights, remedies and privileges with respect to the Subcontractor as the Owner possesses under the said principal contract with respect to the Contractor and the Subcontractor hereby expressly agrees to comply with all of the obligations with respect to the termination that the Contractor is required to comply with under the terms of the principal contract. In the event of such termination, the Contractor's liability on this agreement shall not exceed the termination allowance which shall be made by the Owner to the Contractor for the work covered herein less such part of said sum as represents the Contractor's overhead and profit allocable thereto.

Liquidated Damages:

Twentieth: In the event any acts or omissions of the Subcontractor cause or contribute to any failure on the part of the Contractor to complete all work within the time fixed in the principal contract, or any extension thereof, and the [fol. 95] Contractor is required to pay the Owner liquidated damages, the Subcontractor shall, upon demand of the Contractor, promptly pay to and reimburse the Contractor for the amount of any such liquidated damages caused or contributed to by the Subcontractor. In the event that the acts or omissions of more than one Subcontractor shall cause or contribute to any failure on the part of the Contractor to complete the work within the time fixed in the principal contract or any extension thereof, and the Contractor is required to pay the Owner liquidated damages,

the Contractor shall apportion the amount of liquidated damages attributable to each Subcontractor, which apportionment shall be final and binding upon the Subcontractor, and the Subcontractor shall, upon demand by the Contractor, promptly pay to and reimburse the Contractor the amount of any liquidated damages so apportioned to it. The use of the term "penalty" in this agreement shall be intended to mean "liquidated damages."

Liability:

Twenty-First: (a) The Subcontractor hereby assumes the entire responsibility and liability for any and all injury to or death of any and all persons, including the Subcontractor's agents, servants and employees, and for any and all damages to property caused by or resulting from or arising out of any act or omission in connection with this subcontract or the prosecution of work hereunder, and the Subcontractor shall save harmless the Contractor and/or Owner from and against any and all loss and/or expense which they or either of them may suffer or pay as a result of claims or suits due to, because of or arising out of any and all such injuries, deaths and/or damage irrespective [fol. 96] of the fact that the Contractor and/or Owner has contributed thereto or is the cause thereof, and the Subcontractor, if requested, shall assume and defend at his own expense any suit, action or other legal proceedings arising therefrom, and the Subcontractor hereby agrees to satisfy, pay and cause to be discharged of record any judgment which may be rendered against the Contractor and/or Owner arising therefrom.

(b) The Subcontractor agrees to indemnify, protect and hold harmless the Contractor and/or Owner from loss or damage and to reimburse them for any expenses including Attorney's fees, to which they or either of them may be put, as a result of claims made or litigation instituted on account of violation or infringement, or alleged violation or infringement of any letters patent, or patent-rights arising out of the work of or method, materials or things used by the Subcontractor and the Subcontractor agrees to satisfy, pay, and cause to be discharged of record any judgment

which may be rendered against the Contractor and/or Owner arising therefrom.

(c) In the event of any such loss, expense, damages or injury, or if any claim or demand for damages as aforesaid is made against the Contractor and/or Owner, the Contractor may withhold from any payment due or thereafter to become due to the Subcontractor under the terms of this subcontract, an amount sufficient in its judgment to protect and indemnify it and the Owner from any and all claims, expense, loss, damages or injury, and the Contractor in its discretion, may require the Subcontractor to furnish a surety bond satisfactory to the Contractor pro- [fol. 97] viding for such protection and indemnity, which bond shall be furnished by the Subcontractor within five (5) days after written demand has been made therefor. The expense of said bond shall be borne by the Subcontractor.

Twenty-Second: The Contractor shall not be liable to the Subcontractor for any damages whatsoever arising from the negligence of the Contractor, its servants, agents or employees, except for such damages as shall arise from gross and wanton acts of negligence.

Delay:

Twenty-Third: (a) In the event work of the Subcontractor is delayed without his fault and for causes which would entitle the Contractor to extensions of time as provided in the principal contract, the Subcontractor agrees that he will notify the Contractor in writing of the nature and causes of such delay in such time and in such manner as will enable the Contractor to present a claim to the Owner for extension of time in accordance with the provisions of the principal contract. Should the Subcontractor fail to strictly comply with the provisions of this paragraph within 48 hours after such delay commences, he shall waive all rights he may have for extension of time in performance of this work. Subcontractor's rights with respect to delay are hereby specifically limited to an extension of time and he shall have no claim for damages against the Contractor

and/or Owner arising out of delay from any cause whatsoever.

[fol. 98] (b) The Contractor may order the Subcontractor to suspend all or any part of the work undertaken hereunder for such period of time as may be determined by it, to be necessary or desirable for the convenience of the Contractor and/or Owner. Unless such suspension unreasonably delays the progress of the work as determined by the Contractor and causes additional expenses or loss to the Subcontractor, no increase will be allowed in the price contracted for hereunder. Should the Contractor through direction of the Owner or through no fault on its part suspend operations or discontinue work, the Subcontractor agrees that he will not have, nor assert any other, or larger claim against the Contractor as a result of such discontinuance or suspension than the Contractor may have against the Owner on account of the Subcontractor's portion of the total project work.

Waiver:

Twenty-Fourth: Failure by the Contractor in any instance to insist upon observance or performance by the Subcontractor of all the terms, conditions or provisions of this subcontract shall not be deemed a waiver by the Contractor of any such observance or performance; no waiver shall be binding upon the Contractor unless in writing signed by the Project Manager and shall then be for the particular instance only; waiver of any one breach shall not be deemed a waiver of any other breach, payment of any sum by the Contractor to the Subcontractor with knowledge of any breach shall not be deemed to be a waiver of any such breach or any other breach.

[fol. 99] Notice:

Twenty-Fifth: Whenever under the provision of this agreement, notice is required to be given to a party, such notice shall be given by telegraph or by mail postage addressed to such party at its address above given and such notice shall be deemed to have been given when the notice was thus telegraphed or mailed.

Arbitration:

Twenty-Sixth: (a) Any controversy or claim arising out of or relating to this agreement or the breach thereof, provision for the determination of which is not made elsewhere in this agreement, shall be settled by arbitration in the Borough of Manhattan, City and State of New York in accordance with the Civil Practice Act of the State of New York. The Contractor and the Subcontractor agree that any application by either side for the appointment of an arbitrator in accordance with this paragraph shall be made in the Supreme Court of the State of New York, County of New York, and that said Court shall have jurisdiction over every party in connection with any such arbitration. The cost of such arbitration shall be borne equally.

(b) In the event that a Court of competent jurisdiction enters a valid final determination to the effect that the Supreme Court of the State of New York, County of New York, lacks jurisdiction of the subject matter or the parties, then and in that event any controversy or claim arising out of or relating to this agreement or the breach thereof, provision for the determination of which is not [fol. 100] made elsewhere in this agreement, shall be settled by arbitration in New York, N. Y., in accordance with the rules then obtaining of the American Arbitration Association and judgment upon any award rendered therein may be entered in any Court having jurisdiction. The Contractor and the Subcontractor agree that the American Arbitration Association shall have jurisdiction over every party in connection with any such arbitration, and the Subcontractor agrees at any and all times to become a party to and be bound by the award in any arbitration with the Contractor. Service of an application for arbitration or of a notice for submission to arbitration hereunder shall be sufficient if, made by registered mail directed to the party at its respective address given above. The cost of such arbitration shall be borne equally.

(c) In the event the Contractor is of the opinion that any other parties having contractual relations with the

Contractor (herein referred to as "Impleaded Parties") may in any manner whatsoever be involved in any claim either of the Contractor or the Subcontractor, which is the subject of arbitration under this agreement, the Contractor shall have the right to make such "Impleaded Parties" party to an arbitration proceeding between the Contractor and Subcontractor by mailing notice to such "Impleaded Parties" requiring them to become parties thereto. All questions raised by the Contractor, the Subcontractor and "Impleaded Parties" shall be determined in one arbitration proceeding and an award rendered in favor of or against any of the Parties thereto. The arbitration proceeding provided for by this paragraph shall be held under [fol. 101] the auspices and in accordance with the rules and regulations of the American Arbitration Association, New York, N. Y. The provisions of this paragraph providing for the arbitration forum of the American Arbitration Association shall be applicable only to the special conditions set forth herein where an "Impleaded Party or Parties" are involved and shall not apply to any arbitration where only the Contractor and Subcontractor are involved. The inclusion of a similar clause in any agreement made by the Contractor with any "Impleaded Party" in connection with the instant project shall be sufficient to enable the Contractor to compel the Subcontractor to become a party to any arbitration proceeding between the Contractor and any "Impleaded Party".

Law:

Twenty-Seventh: This agreement shall take effect and shall be construed in accordance with the laws of the State of New York.

Supersedure:

Twenty-Eighth: Each of the parties hereto agrees and represents that this writing comprises the full and entire agreement between the parties affecting the work provided for herein and no other agreement or understanding of any nature concerning same has been entered into or will be recognized and that all acts, work performed, or

payments made prior to the execution hereof shall be deemed merged in and superseded by this subcontract. No modification of this agreement shall be effective unless it is in writing. This agreement shall be binding upon and inure to the benefit of the parties hereto and their respec- [fol. 102] tive successors, legal representatives and assigns. Notwithstanding the foregoing, the Subcontractor shall not assign this agreement or any part thereof of any sums due hereunder, or sublet, assign or subcontract, any part or all of the work to be performed hereunder or the proceeds hereof, without the prior written consent of the Contractor. The Contractor, however, reserves any and all rights to assign this contract.

Twenty-Ninth: The Subcontractor agrees that the Owner shall, until three (3) years after final payment under the principal contract, have access to and the right to examine any pertinent books, documents and papers of the Subcontractor involving transactions relating to the subcontract.

Thirtieth: The Subcontractor shall furnish performance and payment bonds each in the penal sum of 100% of the contract price with good and sufficient sureties acceptable to the Contractor dated as of the date of this subcontract. Premiums for said bonds up to 1% of the contract price are to be paid by the Contractor. Any cost in excess thereof is to be paid by the Subcontractor. In the event that this contract is signed without bonds being furnished by the Subcontractor, such signing shall not constitute a waiver of the Subcontractor's obligation to furnish the required bond or bonds. The Contractor may demand payment and performance bonds at any time before final payment is made to the Subcontractor and failure by the Subcontractor to furnish such bond and/or bonds within five (5) days after demand, shall constitute a default hereunder.

Thirty-First: In the event Subcontractor fails to execute and return this subcontract to the Contractor within [fol. 103] 10 days from the date hereof, it shall be deemed canceled, null and void and inoperative, at the option of the Contractor. The execution of this subcontract by the

Subcontractor constitutes an offer to the Contractor and shall not be deemed to be accepted until this subcontract is executed by the Contractor.

Renegotiation:

Thirty-Second: If the principal contract is subject to the Renegotiation Act of 1951, (P. L. 9, 82nd Congress), or any amendment thereto, or any other Renegotiation Act, then it is agreed by the parties hereto that all the provisions of such Act or Acts and pertinent regulations promulgated thereunder shall be deemed a part of and incorporated in this subcontract as if set forth at length herein and the Subcontractor hereby agrees to be bound by the terms thereof and to comply with all its provisions.

Thirty-Second: See next pages.

Thirty-Third: The Subcontractor hereby acknowledges and agrees to the substitution of Wage Determinations T-25, 574, T-25, 575, T-25, 576 and T-25, 577 dated 19 June 1959 in lieu of Wage Determinations T-20-194, T-20-195, T-20-196 and T-20-197 in the specifications of the principal contract.

Thirty-Fourth: This contract carries priority rating DO-C2 certified under DMS Regulation 2. All purchase orders issued must contain this priority rating.

In Witness Whereof, Five Boro Construction Corp. and Subcontractor have, has caused these presents to be signed and their, its seal affixed by their, its respective duly au-
[fol. 104] thorized officers and ..... has set his hand and seal the day and year first above written.

FIVE BORO CONSTRUCTION CORP.,

BY NATHAN COHEN,
Contractor.

Witness:

EDWIN ALBOM.

MOSELY PLUMBING &
HEATING COMPANY,

By H. W. MOSELEY,
Owner,
Subcontractor.

Witness:

JAMES J. MASTERSIN.

Thirty-Third: The following clauses of the principal contract are hereby attached to and made a part of this agreement as Article Thirty-Third thereof:

"19. Nondiscrimination in Employment (ASPR-12-804).

(a) In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or, recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post hereafter in conspicuous places, [fol. 105] available for employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provision of the nondiscrimination clause."

"20. Davis-Bacon Act (40 U.S.C. 276a-a(7)).

"(a) All mechanics and laborers employed or working directly upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Act (Anti-Kickback) Regulations (29 CFR, Part 3)) the full amounts due at time of payment, computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between

the Contractor or Subcontractor and such laborers and mechanics; and a copy of the wage determination decision shall be kept posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers.

"(b) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any Subcontractor directly on the site the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, the Contracting Officer may (1) by written notice to the Government Prime Contractor terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages, and (2) prosecute the work to completion by con-
[fol. 106] tract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

"(c) Paragraphs (a) and (b) of this clause shall apply to this contract to the extent that it is (1) a prime contract with the Government subject to the Davis-Bacon Act or (2) a subcontract under such prime contract.

"21. Eight-Hour Laws—Overtime Compensation.

"No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any Subcontractor contracting for any said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every laborer and mechanic employed by the Contractor or any Subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this

clause a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause, and all penalties thus imposed shall be withheld for the use and benefit of the [fol. 107] Government: Provided, that this stipulation shall be subject in all respects to the exceptions and provisions of the Eight-Hour Laws as set forth in 40 U.S.C. 321, 324, 325, 325a and 326, which relate to hours of labor and compensation for overtime.

"22. Apprentices.

"Apprentices will be permitted to work only under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U. S. Department of Labor; or if no such recognized Council exists in a State, under a program registered with the Bureau of Apprenticeship, U. S. Department of Labor.

"23. Payroll Records and Payrolls.

"(a) Payroll records will be maintained during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records will contain the name and address of each such employee, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid. The Contractor will make his employment records available for inspection by authorized representatives of the Contracting Officer and the U. S. Department of Labor, and will permit such representatives to interview employees during working hours on the job.

"(b) A certified copy of all payrolls will be submitted weekly to the Contracting Officer. The Government Prime Contractor will be responsible for the submission of certified [fol. 108] copies of the payrolls of all subcontractors. The certification will affirm that the payrolls are correct and complete, that the wage rates contained therein are not

less than the applicable rate contained in the wage determination decision of the Secretary of Labor attached to this contract, and that the classification set forth for each laborer or mechanic conform with the work he performed.

"24. Copeland (Anti-Kickback) Act—Nonrebate of Wages.

The regulations of the Secretary of Labor applicable to Contractors and Subcontractors (29 CFR, Part 3), made pursuant to the Copeland Act, as amended (40 U. S. C. 276c) and to aid in the enforcement of the Anti-Kickback Act (18 U. S. C. 874) are made part of this contract by reference. The Contractor will comply with these regulations and any amendments or modifications thereof and the Government Prime Contractor will be responsible for the submission of affidavits required of Subcontractors thereunder. The foregoing shall apply except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions.

"25. Withholding of Funds to Assure Wage Payment.

"There may be withheld from the Contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics employed by the Contractor or any Subcontractor the full amount of wages required by this contract. In the event of failure to pay [fol. 109] any laborer or mechanic all or part of the wages required by this contract, the Contracting Officer may take such action as may be necessary to cause the suspension, until such violations have ceased, of any further payment, advance, or guarantee of fund to or for the Government Prime Contractor.

"26. Subcontracts—Termination.

"The Contractor agrees to insert Clauses 20 through 26 hereof in all subcontracts and further agrees that a breach of any of the requirements of these clauses may be grounds for termination of this contract. The term 'Contractor' as used in such clauses in any subcontract shall be deemed

to refer to the Subcontractor except in the phrase Government Prime Contractor'."

This sheet reflecting changes therein to be attached to and to become a part of a contract agreement between The Five Boro Construction Co., New York City, N. Y. and The Moseley Plumbing and Heating Co., Macon, Georgia on mechanical work only in connection with Government Contract No. DA-09-133-ENG-3686 dated August 9, 1959.

It is understood and agreed that the following changes and conditions exist:

(1) There is no painting of any nature included in this agreement.

(2) Smoke stacks and breechings to boilers and water heaters are to be provided by others, delivered to the job site, as specified under section 13, 'Miscellaneous Metalwork', page 13-10, paragraph 13-32 entitled 'Metal Smoke [fol. 110] Stacks', and are to be erected and installed by the Moseley Plumbing and Heating Co.

(3) Section No. 53 titled 'Water Pump House' as contained in this agreement is to include the mechanical work only, less the deep well pumps and starters for same, no concrete work, masonry work or general building construction work is included.

(4) Range Hoods are to be furnished and installed by others as specified under Section 29-A, 'Food Service Equipment', Page 29A-12, paragraph 29A-11 entitled 'Ventilating Hoods over Ranges'. Air filters and holding frames for these ranges will be provided by the Moseley Plumbing and Heating Co. and delivered to the Range Hood fabricator for building into the range hoods by others.

(5) Temporary Water Lines and temporary toilet accommodations are not a part of this contract agreement.

COUNSEL'S NOTE

"The parties stipulate that the subcontract for work at Turner Air Force Base Defense Area, Georgia attached to the complaint and designated as Exhibit 2 is identical

to the contract for work at Robins Air Force Base Defense Area, Georgia, hereinabove printed as Exhibit A, except for the location of the work and the amount of the contract price."

[fol. 111]

EXHIBIT B TO COMPLAINT

Supreme Court of the State of New York, County of New York.

In the Matter of the Application of

Electronic & Missile Facilities Inc., Petitioner, for an order directing that the arbitration provided for in certain contracts in writing entered into by the petitioner and

H. W. Moseley d/b/a Moseley Plumbing & Heating Company, Respondent, proceed pursuant to the provisions thereof and of Article 84 of the Civil Practice Act.

Upon the annexed petition of Electronic & Missile Facilities Inc., petitioner herein, sworn to the 8th day of February, 1961, and on all the proceedings had herein, let the respondent or its attorney show cause before a Justice of this Court, sitting at a Special Term thereof, to be held at the Court House Borough of Manhattan, City and State of New York, on the 28 day of February, 1961, or as soon thereafter as counsel can be heard, for an order pursuant to the provisions of Article 84 of the Civil Practice Act directing that an arbitration provided for in the agreements referred to in said petition proceed and that this Court appoint an arbitrator who shall set under said contracts as arbitrator with the same force and effect as if he had been specifically named therein, and for such other and further relief as to the Court may seem just and proper.

[fol. 112] Let Service of this order to show cause by registered mail, Respondent be deemed good and timely service if mailed on or before the 17 day of February, 1961.

Dated: New York, New York, February 16, 1961.

IRVING L. LEVEY,
Justice of the Supreme Court.

Supreme Court of the State of New York, County of New York.

In the Matter of the Application of:

Electronic & Missile Facilities, Inc., Petitioner, for an order directing that the arbitration provided for in certain contracts in writing entered into by the petitioner and

H. W. Moseley d/b/a Moseley Plumbing & Heating Company, Respondent, proceed pursuant to the provisions thereof and of Article 84 of the Civil Practice Act.

To the Supreme Court of the State of New York:

The petitioner, Electronic & Missile Facilities Inc., respectfully shows to this Court and alleges:

First: That at all times hereinafter mentioned your petitioner was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Second: Your petitioner was formerly known by the name of Five Boro Construction Corp.

[fol. 113] Third: A certificate changing the name of Five Boro Construction Corp. to Electronic & Missile Facilities Inc. was duly filed with the Secretary of State of the State of New York.

Fourth: That heretofore and on or about the 9th day of August, 1959, petitioner entered into an agreement in writing with H. W. Moseley d/b/a Moseley Plumbing & Heating Company, maintaining its principal place of business at 2764 Montpelier Avenue, Macon, Georgia, wherein the respondent was to perform all plumbing and all other appurtenant work required under the prime contract between the Corps of Engineers, U. S. Army, Savannah District and the petitioner for the construction of Nike-Hercules Facilities R-28 and R-88, Robins Air Force Base Defense Area, Georgia. A copy of said agreement, marked "Exhibit 1" is hereto annexed and made a part hereof.

Fifth: That heretofore and on or about the 5th day of October, 1959, petitioner entered into an agreement in

writing with H. W. Moseley d/b/a Moseley Plumbing & Heating Company, maintaining its principal place of business at 2764 Montpelier Avenue, Macon, Georgia, wherein the respondent was to perform all plumbing and all other appurtenant work required under the prime contract between the Corps of Engineers, U. S. Army, Savannah District and the petitioner for the construction of Nike-Hercules Facilities TU-28 and TU-79, Turner Air Force Base Defense Area, Georgia. A copy of said agreement, marked "Exhibit 2" is hereto annexed and made a part hereof.

[fol. 114] Sixth: That petitioner has duly performed to date all the terms and conditions on its part to be performed.

Seventh: That there has arisen a dispute as to the amount of money that is due the respondent for work accomplished and for the amount of money due the petitioner for necessary expenditures in order to aid the respondent in completing his work.

Eighth: Pursuant to Paragraph 26(a) of subcontracts, the parties agreed that "any controversy or claim arising out of or relating to this agreement or the breach thereof, provision for the determination of which is not made elsewhere in this agreement, shall be settled by arbitration in the Borough of Manhattan, City and State of New York, in accordance with the Civil Practice Act of the State of New York. The contractor and the subcontractor agree that any application by either side for the appointment of an arbitrator in accordance with this paragraph shall be made in the Supreme Court of the State of New York, County of New York, and that said Court shall have jurisdiction over every party in connection with any such arbitration. The cost of such arbitration shall be borne equally."

Ninth: That pursuant to Paragraph 26(b) of subcontracts, service shall be sufficient if made by certified mail directed to the party at its respective address given herein.

Tenth: That there exists no grounds in law or equity for the revocation of the said arbitration agreement.

[fol. 115] Eleventh: That no previous application for the relief herein sought has been made,

Wherefore, your petitioner prays that this Court direct the parties to arbitrate in accordance with the said agreements and the provisions of the Civil Practice Act, and that this Court designate and appoint an arbitrator who shall act under said agreements with the same force and effect as if he had been specifically named therein, and that this Court permit service of this order to show cause by certified mail, and that such service be good and timely, and that your petitioner have such other further and different relief as to the Court may seem just and proper, together with the costs of this proceeding.

Dated: New York, New York.

February ....., 1961.

ELECTRONIC & MISSILE FACILITIES INC.,
NATHAN COHEN,
Executive Vice President.

State of New York,
County of New York, ss:

Nathan Cohen, being duly sworn, deposes and says:

That he is Executive Vice President of Electronic & Missile Facilities Inc., the petitioner herein, and that he has read the foregoing petition and knows the contents thereof, and that the same is true to his knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

[fol. 116] Deponent further says that the reason verification is made by deponent and not by Electronic & Missile Facilities Inc. is because the said Electronic & Missile Facilities Inc., is a corporation and deponent an officer thereof, to wit, its Executive Vice President.

NATHAN COHEN.

Sworn to before me this ..... day of February, 1961.

.....

Georgia, Bibb County:

Personally appeared, H. W. Moseley, who having first been sworn says he is doing business as Moseley Plumbing and Heating Company and the statements contained in the foregoing six Counts of his petition are true and correct.

/s/ H. W. Moseley,

Sworn to and subscribed before me this 23rd day of February, 1961.

/s/ Fran C. Sparks,
Notary Public, Bibb County, Georgia.

My Commission Expires Sept. 10, 1963.

In United States District Court

Restraining Order—February 24, 1961

The foregoing petition came on to be heard on the verified complaint herein, and it appearing to the Court therefrom that there is danger of immediate and irreparable injury, loss and damage being caused to the plaintiff before notice can be served and a hearing had on plaintiff's motion for a preliminary injunction, for the reason that such injuries are liable to occur before a hearing upon notice [fol. 117] can be had because the arbitration proceedings sought to be restrained are set for hearing on February 28, 1961, in the State of New York, and it appearing that the Supreme Court of the State of New York, County of New York having undertaken to assume jurisdiction will proceed at said hearing to appoint an arbitrator and to otherwise affect the rights of plaintiff herein.

It is Ordered that defendant, Electronic & Missile Facilities, Inc., its officers, agents, servants, employees and attorneys and all persons in active concert and participation with it are hereby restrained from any further proceedings or acts of any kind in connection with its application for arbitration in the Supreme Court of the State of New York, County of New York, against H. W. Moseley, d/b/a Moseley Plumbing and Heating Company on condition that

a bond be filed by plaintiff herein in the sum of One Hundred Dollars ($100.00) for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, said bond to be approved by the Clerk of this Court; and it is further

Ordered, that this order expire within ten (10) days after entry unless within said time it is for good cause shown extended for a longer period, or unless defendant consents that it may be extended for a longer period; and it is further

Ordered that plaintiff's motion for a preliminary injunction be set for hearing on March 3, 1961, at 10:30 o'clock a.m. or as soon thereafter as counsel can be heard in the United States District Court room in the City of Macon, Georgia.

[fol. 118] This Order issued at 3:40 o'clock p.m., this 24th day of February, 1961.

W. A. Bootle, U. S. Judge.

I hereby certify that the bond required as a condition of the foregoing order has been filed with the Court and approved by me, and said order has thereby become effective.

This 24th day of February, 1961.

John P. Cowart, Clerk, U. S. Court.

Filed Feb. 24, 1961.

[fol. 119]

IN UNITED STATES DISTRICT COURT

ORDER CONTINUING RESTRAINING ORDER BY CONSENT—March 15, 1961

By consent of the parties the time for filing defensive pleadings of each and every nature by the defendants is extended to and including the 27th day of March 1961.

The temporary restraining order hereinbefore granted on February 24, 1961, is by consent of the parties continued in force and effect until further order of the Court.

This 15th day of March 1961.

W. A. Bootle, U. S. Judge, T. Baldwin Martin, George C. Grant, Attorneys for Plantiff, Bu-[fol. 120] chanan, Edenfield & Sizemore, Newell Edenfield, William H. Major, Attorneys for Defendants.

Filed Mar. 17, 1961.

IN UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION TO DISMISS OR IN LIEU THEREOF TO STAY THE PROCEEDINGS—Filed March 27, 1961

I.

The defendant moves the Court as follows:

1.

To dismiss the action and each and every Count thereof because the complaint fails to state a claim against defendants upon which relief can be granted.

2.

To dismiss the action, and each and every Count thereof, or in lieu thereof to stay the action and all proceedings herein until an arbitration shall be had in accordance with the terms and conditions of the contract entered into between the plaintiff and the defendant, Electronic & Missile Facilities, Inc.

[fol. 121] For grounds of this motion defendants show the Court that the contracts entered into between the parties, which are attached as Exhibit "A" and Exhibit "2" of plaintiff's complaint, in paragraph 26 thereof provides that the parties shall arbitrate any controversy or claim arising out of or relating to the agreement or breach thereof in the Borough of Manhattan, City and State of New York, in accordance with the Civil Practice Act of the State of New York. Such paragraphs of the contracts further provide

that the contractor and subcontractor agree that any application by either side for the appointment of an arbitrator in accordance with such contract provisions shall be made in the Supreme Court of the State of New York, County of New York, and that said Court shall have jurisdiction over every party in connection with any such arbitration, the costs of which shall be borne equally.

Defendants further show that prior to the institution of this action by plaintiff the defendant, Electronic & Missile Facilities, Inc., filed a petition for arbitration in the Supreme Court of the State of New York, Borough of Manhattan, City and State of New York, in accordance with such contract provisions, and that such petition, together with the order thereon, was duly served upon plaintiff in accordance with the provisions of Article 84 of the Civil Practice Act of the State of New York. A copy of such petition and order is attached to plaintiff's complaint as Exhibit "B".

That the contracts entered into between the parties provide in paragraph 27 thereof that they shall be construed in accordance with the laws of the State of New York.

[fol. 122] That under the laws of the State of New York the agreement of the parties to arbitrate is binding upon the parties. That the appropriate portions of Article 84 of the Civil Practice Act of New York is hereto attached marked Exhibit "N" and made a part hereof by reference.

Wherefore, defendants pray that an order be entered by this Honorable Court dismissing plaintiff's complaint or in lieu thereof staying the action and all proceedings herein until an arbitration shall be had in accordance with the terms of the contracts entered into between the plaintiff and the defendant, Electronic & Missile Facilities, Inc.

II.

Defendants' Motion to Strike

Defendants move the Court to strike from plaintiff's complaint the following:

(1) Paragraph 5 of Count 3, together with sub-paragraph (c) of the prayers of such Count wherein plaintiff seeks to recover punitive damages;

(2) Paragraph 5 of Count 4, together with subparagraph (c) of the prayers of such Count wherein plaintiff seeks to recover punitive damages;

(3) That portion of Paragraph 6 of Count 5, and that portion of Paragraph 7 of Count 5 wherein plaintiff seeks to recover punitive damages; and

(4) Paragraph 7 of Count 6, and that portion of Paragraph 8 of Count 6 wherein plaintiff seeks to recover punitive damages.

[fol. 123] on the grounds that punitive damages are not recoverable on actions arising ex contractu.

Wherefore, defendants pray that its Motion to Strike be sustained on each and every ground thereof.

Buchanan, Edenfield & Sizemore, Newell Edenfield,
By William H. Major, Attorneys for Defendants.

715 Citizens & Southern National Bank Building, Atlanta, Georgia.

EXHIBIT "N" TO MOTION

Extract of Portions of Article 84 of Civil Practice Act of New York State

§1448. Validity of Arbitration Contracts or Submissions. Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrator any controversy existing between them at the time of the submission which may be the subject of an action, or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A written submission or provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a con-

troversy or controversies existing at the time of the [fol. 124] submission or thereafter existing between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of such controversy or controversies.

Such submission or contract may include or be limited to questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent, subsequent to or independent of any issue between the parties, without regard to the justiciable character of such questions or controversies.

A controversy cannot be arbitrated, either as prescribed in this article or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness, unless the appropriate court having jurisdiction approve a petition for permission to submit such controversy to arbitration made by the general guardian or guardian ad litem of the infant or by the committee of the incompetent.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person capable of entering into a submission or contract has knowingly entered into the same with [fol. 125] a person incapable of so doing, as prescribed in subdivision one of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

Subdivision two of this section does not prevent the arbitration of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or

of a controversy respecting the boundaries of lands or the admeasurement of dower.

§1449. Form of Contract or Submission.

A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.

§1450. Remedy in Case of Default.

The making of a contract or submission for arbitration described in section fourteen hundred forty-eight, providing for arbitration in this state, shall be deemed a consent of the parties thereto to the jurisdiction of the supreme Court of this state to enforce such contract or submission and to enter judgment on an award thereon. A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, describe in such action may petition the supreme [fol. 126] Court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission. Eight days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner specified in the contract or submission, and if no manner be specified therein, then in the manner provided by law for personal service of a summons, within or without the state, or substituted service of a summons, or upon satisfactory proof that the party aggrieved has been or will be unable with due diligence to make service in any of the foregoing manners, then such notice shall be served in such manner as the Court or judge may direct. The Court, or a judge thereof, shall hear the parties and upon being satisfied that there is no substantial issue as to the making of the contract or submission or the failure to comply therewith, the Court, or the judge, thereof, hearing such application, shall make an order directing the parties

to proceed to arbitration with the terms of the contract or submission.

If evidentiary facts be set forth raising a substantial issue as to the making of the contract or submission or the failure to comply therewith, the Court, or the judge thereof, shall proceed immediately to the trial thereof. If no jury trial be demanded by either party, the Court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may, not later than five days after the service of the order directing a trial of such issue, demand a jury trial of such issue, and if such demand be made, the Court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issued in an equity action. Whenever an immediate trial is ordered the order [fol. 127] therefor shall provide that if the Court, or where a jury has been demanded, the jury, find that a written contract providing for arbitration was made or a submission was entered into, as the case may be, and that there was a failure to comply therewith, the parties shall proceed with the arbitration in accordance with the terms of the contract or submission, and said order shall provide that if the Court or jury, as the case may be, find that there was no such contract or submission or failure to comply therewith then the proceeding shall be dismissed.

The procedure herein provided shall be applicable to any motion made under this article in which an issue is raised as to the making of the contract or submission or the failure to comply therewith.

§1451. Stay of Proceedings Brought in Violation of an Arbitration Contract or Submission.

If any action or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, the supreme Court or the Court in which such action or proceeding shall be brought, or a judge thereof, being satisfied that the issue involved in such action, or proceeding is referable to arbitration under a contract or submission

described in section fourteen hundred forty-eight, shall stay all proceedings in the action or proceeding until such arbitration has been had in accordance with the terms of the contract or submission.

§1459. Arbitration a Special Proceeding.

[fol. 128] Arbitration of a controversy under a contract or submission described in section fourteen hundred forty-eight shall be deemed a special proceeding, of which the Court specified in the contract or submission, or if none be specified, the supreme Court for the county in which one of the parties resides or is doing business, or in which the arbitration was held, shall have jurisdiction.

Any application to the Court, or a judge thereof, hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§1464. Entry of Judgment on Award and Costs.

Upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith as upon a referee's report in an action, except as is otherwise prescribed in this article. Costs of the application and of the proceedings subsequent thereto, not exceeding twenty-five dollars disbursements, may be awarded by the Court in its discretion. If awarded, the amount thereof must be included in the judgment.

§1486. Effect of Judgment and Enforcement.

The judgment so entered has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the Court in which it is entered.

[fol. 129]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO AMEND COMPLAINT AND ALLOWANCE THEREOF—April 27, 1961

Now comes the plaintiff and with leave of Court amends the complaint as follows:

(1)

By adding to paragraph 2 of Count III a new subparagraph to be known as subparagraph (h) as follows:

(h) Moseley had no knowledge of the fraudulent and illegal scheme, plan and design as herein alleged and as specified in subparagraphs (a), (b), (c), (d), (e), (f) and (g) hereof until after he had completed his performance under the contract and then began to receive from the defendant contractor a flood of bills for alleged back-charges and denials for the first time of plaintiff's claims for compensation for work done by him which was not covered by the terms of his contract.

(2)

By striking paragraph 5 of Count III and inserting in lieu thereof the following to be known as paragraph 5:

(5)

Defendant, Electronic & Missile Facilities, Inc., had acted in bad faith as shown by the misconduct, fraud, malice and oppression herein alleged and has caused the plaintiff unnecessary trouble and expense and for these reasons is liable under Ga. Code Sec. 20-1404 for expenses [fol. 130] of litigation including a reasonable attorneys' fee to plaintiff's attorneys for prosecuting this suit, which plaintiff alleges is $20,000.00, and is liable for such other expenses of litigation as may be incurred by Moseley.

(3)

By striking subparagraph (c) from the prayers of Count III and substituting in lieu thereof the following:

(c) That in addition, petitioner have judgment against defendant, Electronic & Missile Facilities, Inc., for $20,000.00 at attorneys' fees and such other expenses of this litigation as may be incurred.

(4)

By striking from Count IV the prayers of subparagraph (c) and substituting in lieu thereof the following:

(c) That in addition, petitioner have judgment against defendant, Electronic & Missile Facilities, Inc., for $20,000.00 as attorneys' fees and such other expenses of this litigation as may be incurred.

Wherefore, petitioner prays that this amendment be allowed and ordered filed.

T. Baldwin Martin, George C. Grant, Attorneys for Petitioner.

[fol. 131] Of Counsel: Martin, Snow, Grant & Napier, 503 First National Bank Building, Macon, Georgia.

Georgia, Bibb County.

The foregoing amendment is hereby allowed and ordered filed subject to Motions and Objections.

This 27 day of April, 1961.

W. A. Bootle, United States Judge.

Filed Apr. 27, 1961.

In United States District Court

Defendants' Renewed Motion to Dismiss or in Lieu Thereof to Stay the Proceedings—Filed April 27, 1961

I.

The plaintiff having amended its petition, defendants now renew their original motion to dismiss as to each and every count thereof because the complaint as finally amended fails to state a claim against defendants upon

which relief can be granted, and in lieu thereof renews its motion to stay the action and all proceedings herein until an arbitration shall be had in accordance with the terms and conditions of the contract entered into between the plaintiff and the defendant, Electronic and Missile Facilities, Inc.

[fol. 132] II.

Motion to Strike

Defendants move to strike from plaintiff's complaint the allegations contained in paragraph 5 of Count 3 and subparagraph (c) of the prayers of Count 3, together with subparagraph (c) of the prayers of Count 4 wherein the plaintiff seeks to recover attorney's fees and other expenses of the litigation on the grounds that such items are not recoverable under the allegations of plaintiff's complaint.

Wherefore, defendants pray that an order be entered by this Honorable Court dismissing plaintiff's complaint or in lieu thereof staying the action and all proceedings herein until an arbitration shall be had in accordance with the terms of the contracts entered into between the plaintiff and the defendant, Electronic & Missile Facilities, Inc., and further that its motion to strike be sustained on each and every ground thereof.

Buchanan, Edenfield & Sizemore, By Newell Edenfield, William H. Major, Attorneys for Defendants.

715 Citizens & Southern National Bank Building, Atlanta 3, Georgia.

[fol. 133]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF NATHAN COHEN—Filed July 20, 1961

State of New York,
County of New York, ss.:

Nathan Cohen, being duly sworn, deposes and says:

That he resides at 19 Olive Street, Great Neck, New York; that he is the Executive Vice President of Electronic

& Missile Facilities, Inc., a New York corporation, a defendant herein, and makes this affidavit in support of defendant's motion to stay the above entitled action pending arbitration. I am a member of the American Society of Military Engineers.

Electronic & Missile Facilities, Inc. is the general contractor for the construction of two (2) Nike installations for the Warner Robins Air Force Base Defense Area, one on either side of the Robins Air Force Base, and two (2) Nike installations for the Turner Air Force Base Defense Area, one on either side of the Turner Air Force Base. These installations were constructed in accordance with contracts entered into with the U. S. Corps. of Engineers. The plaintiff was a subcontractor of the defendant, Electronic & Missile Facilities, Inc., on each of the aforesaid projects and has instituted actions under the Miller Act.

In his capacity as Executive Vice President of this company he has worked on twenty-eight (28) anti-aircraft installations for the United States Government of which eight (8) were Nike installations similar to the ones installed by this company in the Robins and Turner Air Force Base [fol. 134] Defense Areas; he helped estimate an additional twenty-five (25) anti-aircraft installations in various parts of the country; he built one radar station and estimated six radar stations; that he built one communications center for an anti-aircraft warning system and estimated several others.

That since 1950, he has been interested in the construction of various facilities for the anti-aircraft network throughout the United States and is familiar with any of the functions and requirements of these systems. That as a result of the study of various plans and specifications for these installations together with information gleaned from trade publication and other sources of public information together with conversations with various members of the Armed Forces connected with the anti-aircraft systems and based on information furnished by the Army and Air Force he states that the Nike-Hercules installations built for the Corps of Engineers at Warner Robins Air Force Base Defense Area and Turner Air Force Base Defense

Area are part of an international network stretching from the Arctic Circle in North America to Florida and California and is connected with Supreme Headquarters, Allied Powers, Europe (SHAPE) in Europe and works in conjunction with the Royal Air Force Fighter Command in England.

The anti-aircraft defense of the United States is based on three layers of defense:

First: On receipt of a warning signal the entire system is alerted in the United States from a base in Colorado. Planes are first sent out as the first wave of interceptors against enemy aircraft.

[fol. 135] Second: In the event any enemy aircraft penetrates the first wave of planes, BOMARC installations then send out their guided missiles to intercept the enemy plane.

Third: In the event any enemy plane penetrates the second wave of interceptors, the Nike installations are designated to act as a third and final wave of interception.

The Nike installations at the Warner Robins Air Force Base Defense Area and the Turner Air Force Base Defense Area are merely four of approximately seven hundred (700) different bases tied together by a system called Semi-Automatic Ground Environment System (SAGE) with headquarters in Colorado. This system on the North American Continent consists of bases in three lines stretching across Canada, Texas Towers at sea, radar stations and communications centers stretching along both seaboard of the United States and BOMARC and Nike Stations scattered throughout the United States. The Nike stations erected by this company are designed not only to protect the Strategic Air Command bomber bases at Warner Robins Air Force Base Defense Area and the Turner Air Force Base Defense Area but to intercept enemy planes coming from abroad heading towards other installations in the United States. They are integral parts of an intercontinental defense system, and were constructed to enlarge the existing facilities for such systems.

All subcontracts for performance of the various phases of work, including the subcontract of the plaintiff, were

executed by the Electronic & Missile Facilities, Inc. at its [fol. 136] executive offices in New York after they had been executed by the subcontractors. Most of the subcontractors of the project came from states other than Georgia. Almost all of the material used in the two projects, including the material used by the plaintiff was manufactured in states other than Georgia and shipped either directly to the project site or to suppliers who reshipped the material to the job site. A large portion of the supervisory personnel of the defendant and of many of its subcontractors came from states other than Georgia.

Our company has worked on four Strategic Air Command Bases and I am familiar with their function as an international defense organization. The bombers bases on Warner Robins Air Force Base Defense Area and the Turner Air Force Base Defense Area are intercontinental and are engaged in interstate commerce. The Nike installations, while not directly on the Bases because of technical requirements, are an integral part of the defense of the bases in the event of hostilities.

Further, planes of the Military Air Transport Service (MATS) carrying material and personnel, both military and civilian, land and take off from the Warner Robins Air Force Base and the Turner Air Force Base.

Attached hereto is a letter received from Col. Barney Oldfield, United States Air Force, Chief of Information, confirming many of the statements in this affidavit.

Nathan Cohen

[fol. 137] Sworn to before me this 14th day of July, 1961.

Anthony J. Siminerio, Notary Public, State of New York.

Commission Expires March 30, 1963.

ATTACHMENT TO AFFIDAVIT

Headquarters

North American Air Defense Command
Ent Air Force Base, Colorado

Melrose 5-8911
Ext: 2388

In Reply Refer To:
Office of Information

July 11, 1961

Dear Mr. Cohen:

In answer to your query about the Nike installations, and their relationship to the total aerospace defense activity of the North American Air Defense Command, let me say this:

The North American Air Defense Command (NORAD) is a two nation (Canada and the U. S.) effect, contributed to in forces and weapons systems by the Royal Canadian Air Force, the U. S. Army (the Nike Hercules and Ajax sites), Navy, and Air Force. About 200,000 people are involved and they are on some 700 different locations—bases, installations, sites, ships, airborne early warning aircraft, texas towers at sea—on 24-hour daily duty.

[fol. 138] About 10,500,000 square miles of land mass and seaward approaches are involved in linear measurement, or surface spread, and our radar, or electronic detection impulses go hundreds of miles off the surface in aerospace tracking of satellites, rocket firings, and orbits (as an example, the vehicle which the Russians say carried Major Yuri Gagarin on his space orbit was carried by our SPADATS (Space Detection and Tracking System) Center here—a part of the NORAD Combat Operations Center).

It must be apparent to anyone that we could not manage anything as complex and fast moving (we must be able to track 18,000-mile-an-hour orbits, as well as slower moving bombers of intercontinental range) without a communications network. So, all Nike sites, all jet fighter-interceptor stations, all radar units are tied to NORAD by landline circuits, microwave relay, and tropospheric scatter

communications. Not only is this true of Canadian-US area, but we feed all the findings of our apparatus to Hq Royal Air Force Fighter Command in England, and to Supreme Headquarters, Allied Powers, Europe (SHAPE) in Paris. They likewise feed us information that they get. We are not only inter-state, we are international or global. For our communications alone, we spend more than 100,000,000 dollars annually to tie this all into an instantly manageable whole (as an example of how fast it works, then the Ballistic Missile Early Warning System (BMEWS) site in Thule, Greenland picked up the moon 240,000 miles away, the impulse to and from the moon made the trip in 2.5 seconds).

[fol. 139] I trust this answers your requirement.

Sincerely,

BARNEY OLDFIELD,
(Barney Oldfield),
Colonel, USAF,
Chief of Information

Mr. Nathan Cohen,
Electronics & Missiles Facilities,
2 Lafayette Street,
New York 7, NY

IN UNITED STATES DISTRICT COURT

DEPOSITION OF MAJOR JOHN W. POSTON

11 A. M.
August 5, 1961.

Deposition of Major John W. Poston, witness called by Plaintiff in above case, in accordance with Federal Rules of Civil Procedure, before Claude Joiner, Jr., Notary Public, Georgia, Bibb County, at time and place stated.

Stipulation:

Deposition taken by agreement, with all formalities being Waived. Reading and signing of deposition by witness

expressly Waived by counsel for all parties and the witness.

All objections, except as to form of question, Reserved to the time of trial.

[fol. 140] Major John W. Poston, witness called in behalf of Plaintiff, being first duly sworn, testified on

Direct examination.

By Mr. George C. Grant:

Q. Will you state your name?

A. John W. Poston.

Q. Are you an officer of one of the Armed Services of the United States of America?

A. Yes, I am in the United States Army.

Q. What is your rank?

A. Major.

Q. Where are you presently stationed, Major Poston?

A. Robins Air Force Base, Georgia.

Q. What are your official duties? What is your official capacity?

A. I am the Operations Office of the 4th Missile Battalion, 61st Artillery.

Q. Just what facilities that that battalion encompass?

A. We have Nike Hercules missile bases at Byron, Georgia and Jeffersonville, Georgia. We have battalion headquarters located on Robins Air Force Base, and we have support shop located on Robins Air Force Base, which is attached to us and not a part of our internal organization.

Q. I will ask you if you are familiar with certain facilities constructed by the Fiveboro Construction Corporation and now known as Electronic & Missile Facilities, Inc., in the vicinity of Jeffersonville, Georgia, and Byron, Georgia?

A. I am familiar with these facilities.

[fol. 141] Q. Are those facilities, which were constructed by that Company, the ones of which you now have command?

A. Yes, they are.

Q. They are the ones which compose this battalion of which you're in charge?

A. Yes, compose our Battery "A" at Jeffersonville and Battery "B" at Byron.

Q. Are you familiar also with a similar type of installation in the vicinity of Albany, Georgia?

A. Yes, I am.

Q. Near Turner Air Force Base?

A. Yes.

Q. Are they or not similar in construction and function to those which you command?

A. Yes, they are, almost identical.

Q. When did you first become familiar with the construction of these bases or facilities, which was done by Electronics & Missile Facilities, Inc.?

A. In March of 1960.

Q. Was that while construction was in progress or before it began or when?

A. That was after construction had begun. It was during the period when—well, the easiest way to define it is to say it was in the initial phases of the actual construction. Land clearing was completed and it was at the very start of the buildings going up and the other facilities being constructed.

Q. Now, you have stated that one of these facilities is located near Jeffersonville, Georgia?

A. Yes.

Q. How far removed is it from the Warner Robins Air Materiel Area Base or the Warner Robins Base?

A. Approximately 23 miles.

[fol. 142] Q. Is that the extent of land separation between the area of the Warner Robins Base and the area of the Nike Hercules installation?

A. That is the extent of the separation as measured by highway, yes, as opposed to a straight line.

Q. This interviewing land then is purely private land, not controlled by the Government, not a part of the Warner Robins Base and not a part of the Nike Hercules Base?

A. Yes, that's true.

Q. Now, with respect to the one located near Byron,

Georgia, will you state similarly the separation of that in distance between the Warner Robins Base?

A. Approximately 17 miles, road distance.

Q. The land on which these two facilities were constructed, the one near Jeffersonville and the one near Byron, before that construction was begun, what was the type of area, was it open land, forest and so forth?

A. It was partially both; in the large, it was open land and not under cultivation, but land that apparently at some time in the past had been under cultivation.

Q. In other words, it began as just purely ground with no facilities of any kind there, and construction was begun from scratch and completed, is that correct?

A. That's true.

Q. State whether or not that same thing is true with respect to the Turner Air Force Base or the installations near the Turner Air Force Base?

A. That is true of the Batteries "A" and "B" and the Nike bases themselves in the Turner defense.

Q. And how far are they separated from the Turner Air Force Base?

A. They're approximately 15 or 16 miles from Turner Air Force Base.

[fol. 143] Q. One in one direction and the other in the opposite direction?

A. One approximately east and one approximately west of the Base.

Q. Warner Robins Air Base, is that or not under the command of the Air Force?

A. Yes, that's an Air Force command.

Q. And you're in the Army?

A. Yes.

Q. And is the Army or not in charge of the Nike Hercules installations which you command?

A. The Army is in charge of the Nike Hercules installations, yes.

Q. Both the ones in the vicinity of Warner Robins and the ones in the vicinity of Turner?

A. Yes, they are Army command.

Mr. Major: Mr. Grant, if we can help you by just assuming that everything at Turner and Warner Robins are the

same, I'm perfectly willing to do that, unless the Major calls our attention to something different; rather than having to force you to lock up Turner with Robins each time, I would assume they're the same and would so stipulate, unless the Major tells us in some specific instance that they're different, if that will help you.

The Witness: In all respects they are identical.

By Mr. Grant:

Q. With respect to the construction of this Nike Hercules base, I believe you stated it was just open ground and built from scratch?

[fol. 144] A. Yes.

Q. Was it or not added to anything that was already there?

A. No, there was nothing there when the construction began.

Q. Now, you have stated that your headquarters is on the Warner Robins Base?

A. Yes.

Q. Is that due to any operational control at the Warner Robins Base or anybody has over your function?

A. No, that's the result of economy and convenience; the Base being Government property already, there would be no need for acquisition of additional real estate to build our headquarters.

Q. Did Fiveboro have anything to do with the construction of the quarters, office quarters, that you occupy on the Base?

A. No, this was done under separate contract by different concern, other than Fiveboro.

Q. Is there anything about your headquarters that would require it to be located at Warner Robins Air Base, rather than in Macon or some other place, other than economy to the Government?

A. No, strictly economy to the Government is the reason for locating there.

Q. So far as the function of these installations which you command, could it have been as well located at some other point, if the Government had had other property there to make it economical for its location?

A. Yes, it could.

Q. At the Nike Hercules installations, are there any facilities for an airport, for the landing and taking off of planes?

[fol. 145] A. There are no facilities for the landing of conventional aircraft. We do have a small area marked off for the finding of helicopters that are used for command visits, inspections and so on, and things of that nature.

Q. Does the operation of these installations as such contemplate the landing or taking off of planes?

A. No.

Q. Or helicopter operation?

A. No, the operation at the site does not require the landing of helicopters. It's a convenience for visitors and inspections.

Q. Do the installations have any function to perform other than one in the nature of waging war?

A. It's the primary purpose of the Nike sites to defend the Country in the event of hostile attack.

Q. Are they to launch missiles that would intercept enemy planes, is that mainly their function?

A. That's true.

Q. And would they be put into actual operation in the launching of missiles, except against enemy planes?

A. No, only against enemy planes in the event of hostilities would there be any launchings from these sites.

Q. I believe you stated you are familiar with what the Fiveboro Construction Company or Electronic & Missile Facilities did by way of construction?

A. Yes.

Q. I'll ask you whether or not the completion of all of the construction required by that contract, the construction of all of the facilities which they were called upon to build, produced anything that was itself then operational as a part of the defense system, or whether there were other things thereafter that had to be done by the Army itself, in order to make it functional?

[fol. 146] A. The completion of the construction by Fiveboro did not make the sites operational. The construction was a prerequisite to the installation of equipment, radar and fire control equipment, launchers and launching equip-

ment, this then made the site operational, upon the completion of that installation.

Q. Is it or not true then that Fiveboro's job was to build certain facilities in the way of buildings and things of that sort, which you could use as housing or station for the equipment which would be installed by the Army itself?

A. That's true.

Q. And with respect to the equipment which makes the base enabled to carry out its function in launching missiles, was that equipment or not installed by the Army itself?

A. That was installed by the Army, by our own troops and our support shop.

Q. Did Fiveboro have anything to do with the installation of that type of equipment?

A. Not a single thing.

Q. If Fiveboro had completed all of their construction required under the contract and then turned over to the Army what had been completed, and no further steps had been taken by the Army, would that construction have ever become a part of any defense system, or would it have been an isolated group of buildings with no connection with any other facility, is what I'm asking?

A. It would have been a set of unused facilities with no function.

Q. Would you describe for us the nature of what the Army had to do, in order to make the construction which Fiveboro had done a part of any defense system or functional as a defense installation?

[fol. 147] A. We had to install vans containing equipment, computers and radar controls. We had to install radar antennas; we had to install the cabling systems which connect these components into an operational system; we had to install launchers; we had to move in assembling equipment for the purpose of assembling and test equipment and we had to move in handling equipment for the purpose of assembling and transporting missiles. We had to move in missiles, missile components and build them into missiles and place them on the launcher which we had installed. We had to develop security systems for protecting the installation. We had to bring in sentry dogs for this function. We had to set up systems for housing, feed-

ing and administering the troops that would occupy the sites; and finally, had to move the troops into the site and give them tactical jobs.

Q. When all of that had been done, was this particular base then tied in by communications system with other similar bases about the Country, in order to afford an integrated defense system?

A. Yes, when that had been completed, each base was tied in by communications to an overall defense effort, which has one national headquarters in control of the efforts of all of such bases.

Q. Does the Warner Robins Air Base which existed before this facility was constructed have anything to do with the operation of this facility?

A. They have nothing to do with the tactical operation of the facility. They perform a function of logistical support in certain areas.

Q. By that, do you mean that some supplies and some services which may be required in the operation of the Nike Hercules installation, may be furnished at Warner Robins?

[fol. 148] A. Yes, that is true.

Q. Is that or not true because it is the nearest sizeable military installation which could furnish the needed services?

A. Yes, that's exactly why.

Q. Is there or not an inter-service agreement, so that an Army facility located near a larger Air Force facility may get certain supply and service functions furnished to it, rather than having to acquire it from some private sources?

A. Yes, an inter-service agreement is necessary between the Continental Army Command, which in this case is Third Army, with the Air Force installation. This inter-service agreement arranges for certain support in the logistical line, with the field Army reimbursing the Air Force for any and all costs that occur to the Air Force installation.

Q. As an illustration, Major, if one of the automobiles used—or jeep or something—used by your command should need repairs, you could send it to the Warner Robins Base and get those repairs performed, is that true?

A. Yes, that's right.

Q. By the same token, is it or not true that you could send it to a private garage, except for measures of economy to the Government, the Government requiring you to get it done at Government sources rather than at private garages?

A. Yes, we could feasibly be supported in the way you mentioned. We feasibly could be supported in the manner stated by sending our vehicles directly to a private contractor. I might add here, if I may, that if we sent a vehicle to the Air Force for such repairs and we had used prior to this time all of the funds allocated or made available to the [fol. 149] Air Force by the Army for such a purpose, then we would not get our vehicle repaired, not without obtaining extra funds from the Army to the Air Force for that purpose. The point I'm trying to make is, the Air Force does not furnish the money which supports us but that comes from Army source and is made available to the Air Force.

Q. In other words, you have a budget of a certain amount, which can be spent and you spend it by purchasing those services, in effect, at Warner Robins?

A. Right. We purchase our services from Warner Robins Air Force Base, charging them against funds made available by Third Army.

Mr. Grant: He's with you.

Cross examination.

By Mr. Wm. H. Major:

Q. Major, how long have you been in the Army?

A. A total of 14½ years active, almost 5 years reserve.

Q. Have you always—I say how long have you been in the Army, I assume that is in the Army? You haven't been in any other service?

A. No, always in the Army.

Q. Is artillery your field or the particular specialty that you've been in, in the Army during all of your career?

A. Yes, I have always been in the Artillery.

Q. Anti-aircraft artillery or—

A. I served in both. I was commissioned in Anti-Aircraft Artillery.

[fol. 150] Q. Isn't it true that these Nike Hercules facilities on either side of Robins and on either side of Turner Air Force Base are in reality the same thing in a more refined and advanced development as the old fashioned anti-aircraft artillery batteries were?

A. They have the same mission.

Q. Well, isn't that the reason that they're placed on either side of Air Force bases to protect primarily that Air Force base, in the form of an anti-aircraft installation?

A. That is true.

Q. And in the old days they put anti-aircraft batteries just jam up against the field, didn't they? By that, I mean very close to the field itself or sometimes on the field?

A. In the old days anti-aircraft artillery guns, which are more comparable in mission to our system than anti-aircraft artillery automatic weapons, were not so deployed. They were deployed by analysis of their singleshot probability and occupied firing positions then an average distance of 12,000 yards from the area that they were defending.

Q. Then, in addition to those, they had the smaller automatic weapons that were in close proximity to the field or either on the field even for strafing aircraft and that kind of thing?

A. Yes, smaller range and machine guns and 40-millimeter weapons were much closer and even on the area.

Q. Now, isn't it true that the reason that these facilities are some 15 or 20 or 23, or whatever the number of miles they may be from these bases, is because in this modern age you have to—if you're going to destroy the airplane that is attacking that field, you've got to fire at him with these missiles from some distance away, if you have any [fol. 151] hope of stopping him before he reaches the field, isn't that the practical reason that they are the distance they are from the field?

A. Yes, they are sited based on the weapon characteristics.

Q. What I'm saying is, the mission or a mission of these batteries of these Nike Hercules batteries, is to protect these air fields, Robins and Turner, in the same manner as any other anti-aircraft weapon would protect them?

A. Yes, that's right.

Q. Now, in addition to that, these Nike Hercules facilities are tied in with NORAD, North American defense organization, whatever that is?

A. Yes, they are.

Q. What is the name of that organization?

A. It's North American Air Defense Command.

Q. And this abbreviation NORAD stands for the same thing, doesn't it?

A. Stands for the same thing.

Q. Now, as a part of NORAD, you have the so-called early warning systems, consisting of the due line along the northern extremity of Canada and then the mid-Canada line, and the pine-tree line, all of them being early warning devices, isn't that true?

A. Yes.

Q. Now, if an enemy aircraft were to approach from the direction of a hostile enemy, for instance from the direction of Russia, in theory at least it would be picked up by these various lines of radar instruments, is that correct?

A. Yes.

Q. And that information would be forwarded by radio or some other means of communication to headquarters or computing center of this NORAD defense organization? [fol. 152] A. Yes, it would be sent to headquarters, although it might not reach there first.

Q. Then, as a simultaneous thing or perhaps following that, your base would be placed on an alert of one kind or another, depending on what probable trajectory this missile was taking or the aircraft involved was taking; and that warning to your base would come simultaneous with the detection of the aircraft or be relayed through headquarters system of some kind; is that roughly correct?

A. Roughly correct, yes.

Q. And as a part of this same system you have other types of missiles, other than Nike Hercules, that would perhaps be sent to intercept this enemy aircraft, together with fighter interceptor aircraft, at the same time or at a different time, but before it ever got to you, there would be various other interception attempts made at it, would there not?

A. Yes, we are the final defense agency of the overall system, which would include other aircraft and missile systems.

Q. And as a last desperate effort, just before he bombed Warner Robin or Turner, you would try to get him; but after all, your firing command would not come from your local organization but it would be the last chain of an integrated chain of firing command coming down the line as he was progressing; isn't that true, essentially true?

A. No, our decision to fire would be made locally.

Q. Maybe I stated it the wrong way: Your decision to fire would be made locally, but it would have been previously put in motion by this other chain of events that I have asked you about, isn't that correct?

A. The other chain of events which you have mentioned would be an informational source to us of the location of [fol. 153] hostile targets. There could possibly be included in this information directives to engage specific ones of these targets.

Q. Well, by that I mean, you simply don't fire on your own command at unidentified aircraft; somebody else up the chain of command tells you which one is just unidentified and which one is hostile, isn't that true?

A. This would be true or under other circumstances would not be true.

Q. "Under other circumstances"?

A. We have a phase of operations called "autonomous operations", whereby all such decisions would be made by ourselves, using our own facilities for acquisition and identification of aircraft. We would make the decision as to which aircraft were hostile and which ones were not.

Q. Well, are you saying to me that this missile facility at Warner Robins that you're in command of has facilities in which to tell whether an approaching aircraft is hostile or not?

A. We have several such facilities, not at Warner Robins but within our battalion, at our sites.

Q. At your sites, I'm talking about, not at Warner Robins?

A. Yes.

Q. But at your sites?

A. At the sites, yes.

Q. And you don't depend on—what is this other organization, SAGE, the automatic computer business that's called SAGE or whatever it's called; you don't depend on it to identify the aircraft for you?

A. Maybe I can clarify this: There are several options of operation available throughout the whole NORAD system. One of these modes of operation would be highly cen- [fol. 154] tralized, whereby the picture as you have presented it would be precisely so. We would be told a specific target and to engage that specific target. However, this is not necessarily the normal way of operation. There are other modes whereby this NORAD system would serve only as a source of information, with decisions to be made as to what to engage made at the local level. There is still a third way of operation, whereby we would operate totally independent of any outside source. Now, any one of these is possible.

Q. Well, the third source comes about only when somebody wipes out the other sources? You don't intend to operate independent, do you?

A. We do not intend to but we anticipate that this is likely to be our mode of operation, due to the vulnerability of communication facilities to hostile attack.

Q. Now, then essentially your primary mission at this missile facility is to be a part of an inter-continental defense system, isn't that really what it amounts to?

A. Of a continental defense system?

Q. Excuse me, I didn't mean that; crossing national lines into Canada for instance and perhaps even into Mexico or somewhere else; but certainly not confined just to the United States; it pre-supposes that you are tied in with Canada and perhaps other countries, isn't that correct?

A. We are tied in with the early warning lines which you previously mentioned in Canada.

Q. And that is really the primary function of this?

A. Yes.

Q. And its immediate function or local function is to protect, your base to protect Warner Robins, and the one at Turner to protect Turner Air Force Base, is that correct?

[fol. 155] A. The primary reason for these two installations is to protect the SAC installations at these two air force bases.

Q. Now, at Warner Robins aircraft leave and arrive from that Air Force base from all parts of the world, do they not?

A. I would assume so. I am not overly familiar with the operations of the Air Force at Robins.

Q. Well, it being a SAC base—SAC stands for Strategic Air Command, is that right?

A. Yes.

Q. And the Strategic Air Command planes fly all over the world, do they not?

A. Yes.

Q. They certainly fly all over the continental United States, do they not?

A. Yes.

Q. And the Military Air Transport Command lands planes there, do they not?

A. I'm certain they do from time to time.

Q. Now, your headquarters is located on Robins Air Force Base per se, is it not?

A. Yes.

Q. Was it built at about the same time that this missile facility base was built?

A. It was built subsequent to the missile facility base.

Q. And was not built by the Defendant in this case, Electronic & Missile Facilities?

A. No.

Q. It was built by another contractor?

A. Built by another contractor.

Q. But it was built as an integral part of the operation of this missile facility, was it not? In other words, it was built to command, as it were, this missile facility?

[fol. 156] A. Yes.

Q. And you either had to build it there or build it out at the site of one of the facilities or at some other place; you had to have such a building or such a facility?

A. Yes.

Q. Now, you said that after Electronic & Missile Facilities finished its construction, the Army had to move in

and furnish cable connecting, I assume you mean electric cable connecting one spot at the base or at the facility to another?

A. Yes.

Q. The conduit, however, for those cables was already put in by Electronic & Missile, wasn't it?

A. Only partially.

Q. All right sir, you say that the Army—excuse me, go ahead?

A. The conduit was put in by the contractor, connecting the launching pads with the little control center located at each launching section. This would entail about 10 per cent. of the total cabling in the fire control system. The entire balance was dug in and placed by the Army.

Q. I see; and you say that the Army installed the radar and the radar antennas?

A. Installed the radar control and the radar antennas.

Q. But had not the towers for those radar installations already been constructed—

A. Yes, that was part of the contract.

Q. And the launches were installed by the Army?

A. The launches were installed by the Army.

Q. But the launching pads had been built as a part of this construction?

A. Yes.

[fol. 157] Q. And the security and sentry dog functions were installed by the Army?

A. Yes.

Q. But the dog kennels, for instance, and their runs and that kind of thing, had already been built by Electronic & Missile Facilities, had they not?

A. Yes.

Q. And troop facilities, you said had to be installed by the Army, but the actual buildings to house the troops in had been installed by Electronic & Missile Facilities, had they not?

A. Yes, they built the barracks and the administrative building.

Q. Now, do you have barracks for your entire complement of men at the base or do you rotate them in shifts and is that barrack just for those who happen to be on

duty? In other words, are your troops quartered there or are they quartered on Robins?

A. The troops at Byron are all quartered by Byron. The troops at Jeffersonville that are a part of that unit are all quartered at the site at Jeffersonville. There is a small detachment of troops, who man an operational control center belonging to us, of course, but co-located at Jeffersonville, do rotate on 8-hour shifts and are quartered in Robins Air Force Base.

Q. So, a part of your troops are quartered at Jeffersonville, on the missile facility, part at Byron on the missile facility and part are quartered on Robins Air Force Base; is that correct?

A. Yes. At the Jeffersonville installation approximately 127 are quartered on the base, 12 are a part of this other detachment, that are quartered at Robins Air Force Base.

Q. And the same thing is true with Turner, as far as you know?

[fol. 158] A. As far as I know, the same thing is true at Turner; they have the same set-up. They may by local option decide to quarter these 12 people, however, at the base but we chose not to.

Q. Major, I have some publications here and I want you to glance at them and tell me if they are official: The first, Major, has been marked for identification as Defendant's Exhibit "A", and it is titled "Fact Sheet, office of Information, Headquarters, North American Air Defense Command, NORAD" in other words: Will you look at that and tell me if that is an official publication of NORAD as far as you know?

A. This appears to be a fact sheet, which is a common format of distributing general information to the public, put out by NORAD. It is a type of fact sheet that I have not seen. Now, we do use this same format from our own Army Air Defense Command. I would assume that this is a valid set of information.

Q. Defendants' Exhibit "B" I now hand to you, which is on eaxctly the same letterhead or format, just a short sheet; will you tell us about that one please sir?

A. This falls in the same category as the first publication which you showed me, Exhibit "A".

Q. On that exhibit, Major, if you will look at the bottom paragraph on the first page and continuation of that paragraph on the second page, and the first two pargraphs on the second page—the first three paragraphs—excuse me?

A. The first three on the second page?

Q. Yes, sir.

A. Yes.

Q. Those paragraphs deal primarily with antiaircraft artillery units and mention the fact that those allocated to the defense of the Country are under the command of [fol. 159] NORAD: is that pretty much in line with what you and I were discussing a minute ago, the question of chain of command, and so forth?

A. It's in line with it but not nearly specific enough.

Q. But as far as you know, that fact sheet is an official publication of the NORAD organization, is it not, sir?

A. Yes, the information on the fact sheet and the particular paragraphs to which you called my attention are substantially correct.

Q. Now, the next document is Defendants' Exhibit "C", which is a publication called "Sentinel", and if you will look on the inside of the second page, it says that Sentinel is an official Class 5 Air Force newspaper published monthly by and for the personnel, and so forth, and so forth, whatever that means: Can you look at that paper and tell us whether or not it appears to be in your judgment an official publication of the Air Force?

A. Yes, this appears to be an official Air Force publication, an officially sanctioned Air Force publication.

Q. Now, the next is Defendants' Exhibit "D", which is a pamphlet called "An introduction to Nike Hercules": Have you ever seen that pamphlet before, Major?

A. Yes, I have.

Q. I don't know who publishes it but as far as you know, is it accurate within the scope that it covers?

A. Without reviewing it again, it has been some time since I have read this particular pamphlet, I would not want to vouch for its accuracy. This is a publication prepared by the manufacturer as part of his—

Q. —sales pitch?

[fol. 160] A. —sales pitch, yes; and it is not an official source of information.

Q. At the middle of the book—the pages are not numbered but the middle of the book where it's stapled—it shows what I take to be a missile facility, is that in general what your facilities at Robins and Turner look like?

A. The area to the lower left of the illustration is fundamentally what is present at our facilities. The area at the right center showing the missles is not like ours at all, except for the missiles.

Q. But it is true that you have a control center, which would be represented by these buildings down here at the left of this picture?

A. Yes.

Q. And then some distance from it, perhaps a quarter of a mile or so, the actual missiles are sitting on their launching pads, is that roughly correct?

A. Yes, that's true, except that the distance of a quarter of a mile is much too small.

Q. Oh, is that right?

A. Yes.

Q. How far away are the missiles?

A. Approximately in our case 1900 yards, which is over a mile.

Q. Oh yes?

A. About a mile and a quarter.

Q. Now, Major, you are an officer in the Fourth Missile Battalion: Are you the commander of that battalion or are you the operations officer?

A. I'm the operations officer.

Q. And that is a part of the 61st Artillery, is that correct, sir?

A. Yes.

[fol. 161] Q. Now, the 61st Artillery is an antiaircraft artillery unit, is it not?

A. There exists really no such unit as the 61st Artillery. This is more a matter of preserving tradition and history, by giving missile battalions a regimental designation. There are other battalions with the same designation of 61st Artillery, but couldn't even tell you where they are or what they're doing or anything about their personnel and equipment.

Q. In other words, your table of organization under this new missile setup, there just isn't any place for a regiment in your organization, is that what you're telling us essentially?

A. No, I'm not saying that either. There is a place in certain defenses for a regimental type unit but never does a whole regiment with four battalions have such a function. Basically, your missile defense is predicated on a separate battalion and this separate battalion may be taken any place and become part of a group or brigade organization; but it doesn't move about as a group or brigade.

Q. Now, you say that you have certain support facilities on the Base, and I'm talking about on Robins: What do you mean by "support facilities"? Are you talking about the fact that you can draw rations from there and that kind of thing and take your vehicles over there to be repaired, is that what you mean by "support facilities", or what do you mean exactly?

A. Our support facilities at Robins are two-fold. We have our own Third Army Guided Missile Shop, which is attached to us, created by Third Army, an Army organization and attached to us, for the immediate tech service, repair and support of our equipment. Then, of course, we draw upon the Air Force at Robins Air Force base for such things as rations, repair of utilities at the sites [fol. 162] and repair of vehicles and beyond a certain echelon or to a certain echelon or repair we do ourselves; but the heavier repair, we draw that sort of support from the Air Force. Our fire inspection, our sites are inspected for fire hazards by Robins Air Force Base. Logistical support of this nature we draw from them.

Q. Then, except for the fact that you just have to be 15 or 20 miles away from this base as a matter of being able to shoot your missles, you are really a part of Robins Air Force Base, or attached to Robins Air Force Base, for all practical purposes, aren't you?

A. No.

Q. Perhaps I don't phrase myself clearly?

A. Although Robins furnishes this type of support upon our request, with this type of support comes no single bit of control or direction or command. We are completely independent of Robins Air Force Base in that respect.

Q. Yes, but what I'm saying is that you have certain physical facilities on the Base—I'm not talking about command now; I understand that the Army is not commanded by the Air Force—but you have certain facilities on the Base, physical facilities on the Base?

A. Yes.

Q. And both of these missile facilities on either side of the Base are tied in with Robins for such other physical needs as they may have to have from day to day, such as medical facilities for the men and repairs for your missiles and vehicles and so forth; you don't ever go outside of the Robins Base for any physical needs, isn't that correct?

A. No, that's not true. Only a certain amount of our physical needs do we draw from Robins Air Force Base. [fol. 163] By separate contract, with funds made available to us, we effect other repairs and other logistic support from Federal agencies outside. Now, the vast, the largest amount of logistical support comes from Fort Benning and not from Robins at all. Robins supports us in a very minor way.

Q. Tell me where is your next chain of command going up the ladder?

A. We have—

Q. Who is your commanding officer, in other words?

A. My commanding officer is the Battalion Commander, Colonel Grice. In which way do you mean? We serve many masters. Now, we have an administrative—

Q. Well, heading toward the Commander-in-Chief, after you go past Grice, who is above him?

A. Administratively, right now, it is a Major-General Johnston, located at—

Q. I was not talking about the person but just location and so forth?

A. It would be Headquarters Second Region, Army Defense Command, which since 1-August has moved to Oklahoma City, Oklahoma. Now, that is the administrative chain.

Q. What other chains do you have?

A. We have an operational control chain, which is totally different and exists as a separate entity from this other chain.

Q. Now, who would be your—

A. It would be the Commander of the 861st AC&W Squadron, located at Aiken, S. C.

Q. AC&W Squadron, now squadron to me sounds like Air Force?

[fol. 164] A. That's Aircraft Control and Warning, which is the agency through which operational control would be furthered to us under one of the modes of operation which we've discussed earlier, but not under the other two.

Q. And that's located at what location?

A. Aiken, S. C.

Q. Is that at an Army base or an Air Force Base there or what?

A. That's a station, an Air Force station, a very small compound, a small radar compound.

Q. You were on the site daily, were you, as this facility was being built?

A. Yes.

Q. Is it true that much of the equipment that was or much of the material that was put into the base came from states other than Georgia?

A. I am certain that a substantial amount of the material used in the construction of the bases came from states other than Georgia.

Q. And is it true that some of the contractors, for instance, Electronic & Missile who did a prime contract, you are aware of the fact that it was not a Georgia company, aren't you?

A. Yes.

Q. And isn't it true that some of the sub-contracting firms were not Georgia firms?

A. I couldn't say absolutely on that, that all subcontractors; from personal knowledge, I couldn't say.

Q. You're familiar with Mr. Goings of G. & W. Electrical Contractors, one of the sub-contractors on this job?

A. No, I couldn't say that I am.

Q. Were you familiar with the outfit that completed his contract, Fluoro Electric Company?

[fol. 165] A. I'm familiar with the function of those particular contractors on the site but to make a personal iden-

tification of any one individual associated with them at this time I couldn't say I had it or did not have it.

Q. You're not familiar with the fact that both of those are Florida companies?

A. No, I'm not familiar with that. At times I had discussions with all of these people but to say now that I could identify any one of them by name with a face, I couldn't do that.

Q. Major, here's a letter with the letterhead of the North American Air Defense Command, signed by or purporting to be signed by one Colonel Barney Oldfield—I suppose he was that great car driver—will you look at that letter and tell me if you are familiar with Colonel Barney Oldfield's position with that organization?

A. Yes, I have heard of Colonel Oldfield and seen his name on various publications.

Q. Does that letter appear to be an official communication, as far as you can ascertain?

Mr. Martin: How about explaining what you mean by "official communication"? And I notice this is addressed to Mr. Cohen.

By Mr. Major:

Q. Well, I would assume that the Colonel, having signed it in his capacity as Chief of Information or whatever he signs it as, that that would make it an official communication, and I just wanted to ask the Major if he was familiar with the fact that the Colonel did occupy that position?

(Witness reading Defendants' Exhibit "E") . . .

[fol. 166] A. By asking if this is an official piece of communication, are you asking for or implying an indorsement on my part as to the correctness of what's contained in it?

Q. Well, I was going to ask you that next?

A. I believe this is a legitimate letter, written by Colonel Oldfield to an unknown Mr. Cohen.

Q. All right, sir, now, have you read the letter over?

A. Yes, I have.

Q. Is the information in it correct or not, so far as you know; and if you don't know, of course, I don't want to press you on it?

A. (Witness re-reading Deft. Ex. "E") . . . I don't know of my own immediate personal knowledge that everything in this letter is correct. I would assume that it's so.

Q. I don't know that it's too important but is there anything in the letter that you would take issue with particularly; the figures and quotes and so forth make no difference?

A. There is nothing there that I could disprove, no. The only thing I could say is that when he says "we" in the latter stages of his letter, he is definitely not talking about Nike sites. He has switched his context to his own headquarters.

Q. In other words, what you're saying is that Nike missiles don't fire across state lines, is that it?

A. I'm saying that we don't have the mass of international implications that his headquarters does.

Q. And you would have no international connections except as you derived it through NORAD and not initially at your station, is what you're saying; is that correct?

[fol. 167] A. Yes, I'm saying that our function is strictly a local one. It just happens that his headquarters is made up of many many such local functions.

Q. It gets back to what we said originally, that your function, you have an aircraft battery around an Air Force base, essentially?

A. We are a missile defense, defending an Air Force base, yes.

Redirect examination.

By Mr. George C. Grant:

Q. Major Poston, these missiles fired by your installation are vastly different from shells fired by antiaircraft guns, aren't they?

A. Oh, yes, vastly different.

Q. They are controlled in flight by radar and guided in flight by your control?

A. That is right.

Q. And they are designed to intercept planes many miles distant from your location, are they not, to destroy them many miles distant from your location?

A. Relative to the old antiaircraft guns, many miles distant is an appropriate term.

Q. I'll ask you whether or not these facilities, such as that of which you're the operations officer, are designed also to protect cities and towns?

A. Yes, that is a part of its function.

Q. In other words, if any enemy plane were to be headed toward the City of Macon, Georgia, would your facility be designed to protect that city, as well as to protect Robins Air Force Base?

A. Yes, it would.

Q. Is it or not true that the reason for your installation in the vicinity of Warner Robins Air Force Base is not [fol. 168] because of the Base, but because of the location—

Mr. Major: I would object to that question—excuse me, I didn't mean to interrupt, I thought you were through but I do want to object to it as you're leading just a little bit, I think.

Mr. Grant: OK, that's the time to object, before I get through, if it's leading.

Mr. Major: I think that's a leading question.

By Mr. Grant:

Q. All right, sir, is the location of this facility determined by the location of Warner Robins Air Force Base or by one of the tenants of that Base?

A. By one of the tenants of that Base.

Q. And what tenant is that?

A. A wing of the Strategic Air Command is located there.

Q. State whether or not—well, tell me just what you mean by "tenant", Strategic Air Command being a tenant at that base?

A. A tenant is a unit or an organization whose location on a specific post, camp, station or Air Force base does not contribute or is not part of the over-all mission of that base. The tenant is located on the base as a matter of convenience and accomplishes a totally separate mission from that of the particular base on which it's located.

[fol. 169] Q. Is it within that definition that you've just given that the Strategic Air Command is a tenant at Robins Air Force Base?

A. Yes.

Q. And within that definition, that means that they are not a part of the base itself or not necessary to its functions?

A. That's true. They are not necessary to the function of the base.

Q. And I believe you have stated that the primary purpose or mission of a Nike Hercules base is to protect not the base itself but the Strategic Air Command, which is a tenant within that definition?

A. That's the reason for the existence of the Nike Hercules base, yes.

Q. Now, Mr. Major questioned you about your logistical supply and support and I understood you to tell him that by far the majority of your logistical support comes, not from Warner Robins Air Base, but from Fort Benning?

A. That's true.

Q. And Fort Benning, is that or not an Army installation or fort, located near Columbus, Georgia?

A. Yes, sir.

Q. Is that roughly about 90 to 100 miles from Macon or from Warner Robins?

A. Yes.

Q. Now, he questioned you about Defendants' Exhibit "A", headed "Fact Sheet", and I believe your statement with reference to that was you know of that organization, whose name is printed in the form of a letterhead at the top of it, but that you haven't previously seen that particular publication or that particular information in the form of that sheet?

A. That's true.

[fol. 170] Q. I will ask you whether or not that is signed by any person?

A. Normally they are not. No, this is not signed by any person.

Q. Then, is there anything about it by which you can identify it as being anything official other than the letterhead on the top of it?

A. Only by the letterhead on the top of it and by my knowledge that such fact sheets are a standard way of presenting information to the public.

Q. Now, then, Defendants' Exhibit "B", is that in the same category as Defendants' Exhibit "A", and do you have any knowledge of that other than the fact that fact sheets are distributed to the public?

A. That's right, I have no further knowledge of it other than that such fact sheets are distributed.

Q. With reference to Exhibit "C", do you have any information about that, other than the fact that on the second page there is printing which says it is put out by a particular source?

A. None whatever. I have never heard of or seen this publication.

Q. And I believe you testified with reference to Defendants' Exhibit "D", that that is sales talk, put out by the manufacturer of Nike Hercules, that you do not subscribe to what it says and that it is not an official publication?

A. That is put out by the manufacturer and is not official. Frequently we disagree with the information contained in such publication.

Q. With respect to Exhibit "E", I understood you to state to Mr. Major that you disagree insofar as the Nike Hercules installation is concerned with the statement that "We are not only inter-state, we are international, or global" and the language which follows that?

[fol. 171] A. Yes, I disagree as regards the function of the Nike base, that Nike base is included in the word "we" as used in that last paragraph.

Q. And it is your interpretation of Colonel Oldfield's letter that, beginning with that statement which I just quoted and the information contained in the last para-

graph of that letter, that he is talking about his whole defense set-up which he commands and not about Nike Hercules installations themselves?

A. That's true.

Q. I think that's all. . . .

Mr. Major: I don't have anything else.

By Mr. Grant:

Q. I would like to ask the Major this further: You have previously testified, Major Poston, with reference to certain equipment and work that had to be done by the Army itself, in addition to or after Electronic & Missile Facilities had completed its construction contract:

I want to ask you, in order to illustrate the amount of that equipment and work, if you can give us your estimate of the value of the equipment that was installed by the Army?

A. I would say the total value of the equipment installed by the Army was in the neighborhood of 7 million dollars.

Q. Is that just on the Batteries "A" and "B" located at Jeffersonville and Byron that you place that value?

A. That would be the value per site; so, there would be 4, or the total cost would have been 28 million dollars for both defenses, all 4 sites.

[fol. 172] Q. In other words, what you are saying is that it was 7 million dollars for the facility at Jeffersonville, 7 million dollars for the installation at Byron and 7 million dollars at each of the two facilities near Turner Air Force Base?

A. Yes, that is right.

Q. And what is your estimate of the value of the work performed by the Army in the installation of that amount of equipment at these various bases?

A. I would estimate that the value of the labor performed in the installation of the equipment at each site would be $200,000.

Q. That would be $200,000 worth of labor by the Army at the Jeffersonville site and $200,000 at the Byron site?

A. Over the total period involved, yes.

Q. And $200,000 each at the two different sites near Turner Air Force Base?

A. Yes.

Q. Is it or not true that the installation of this 7 million dollars worth of equipment and the doing of work of the value of $200,000 at Jeffersonville and the same amount at each of the other three sites was necessary in order for these facilities to become functional as a part of the defense set-up, after the work of Electronic & Missile Facilities was completed?

A. Yes.

Deposition completed: 12:30 PM 8-5-61.

(Reading and signing by witness Waived.)

Filed Aug. 7, 1961.

[fol. 173]

EXHIBIT A TO DEPOSITION

Fact Sheet.

Headquarters North American Air Defense Command
NORAD

Office of Information
Phone Melrose 5-8911
Ext 2387

Colorado Springs,
Colorado

The North American Air Defense Command (NORAD) with headquarters in Colorado Springs, Colorado, is the first two-country all-service type military command ever to operate within the boundaries of the North American Continent. It is the first peacetime organization with cooperative operational defense planning involving a situation wherein the governments of Canada and the United States place military forces at the disposal of a single joint commander. Additionally, within the United States, it is the first time elements of the three services have operated under one unified commander.

On the recommendation of the Joint Chiefs of Staff of the United States and the Chiefs of Staff Committee of Canada, the Governments of the two countries agreed to the setting up of NORAD on an interim basis September 12, 1957. It became an official integrated command in May 1958 and today exercises operational command over all U.S. air defense forces and operational control of those provided by Canada.

[fol. 174] NORAD's creation was in recognition of the fact that aerospace defense of the continent in the era of supersonic bombers and missiles is a single, common problem; and that there must be in peacetime an organization that could operate immediately at the beginning of an attack in accordance with plans and procedures already jointly approved. NORAD's peacetime job, therefore, is to prepare these plans and procedures for immediate joint action and to weld together an effective, combined force capable of instant reaction to attack.

NORAD's Commander-in-Chief, U.S. Air Force General Laurence S. Kuter is responsible to both the U.S. Joint Chiefs of Staff and the Canadian Chiefs of Staff Committee. His deputy, and the man solely responsible for aerospace defense in the absence of General Kuter from his headquarters, is Royal Canadian Air Force Air Marshal C. Roy Slemon.

General Kuter's career has been varied and comprehensive, encompassing most phases of the military. During his military career he has been a pilot, administrator, educator, author, diplomat, one of the originators of the American World War II air power concept and organizer and operator of the Military Air Transport Service. He assumed command of NORAD on August 1, 1959. Prior to taking over this joint Canadian-United States command, he headed the [illegible]e Air Force with headquarters in Hawaii.

Air Marshal Slemon's experience goes far back. RCAF Chief of Staff before coming to NORAD, he is the only officer still on active duty who was a member of the RCAF when it was formed in 1924. He took part in early explora-

[fol. 175] tory and air mapping operations in the arctic regions of Canada where much NORAD effort is now concentrated.

The establishment of this international command, staffed and run by Canadian and U.S. officers, created certain requirements in handling strictly U.S. affairs. By law, certain matters, such as atomic weapons must always be in the hands of the U.S. For this reason the old Continental Air Defense Command (CONAD), which was created in 1954 to manage U. S. air defense, has been kept in being, although on a greatly reduced scale.

General Kuter also commands CONAD. It is staffed by U.S. personnel on the staff of NORAD, as a dual-role function. Until 1 January 1959, CINC-NORAD previously had only operational control of U.S. forces (as he still has of Canadian forces). This latter meant what the term implied: Control of the forces while they were operating on aerospace defense missions. The change to operational command of U.S. forces means that the CinC has greater authority over these forces, as provided by the U.S. Defense Reorganization Act. This is the congressional act designed to strengthen and streamline the U.S. military structure, to eliminate duplication, and to generally economize and at the same time make the defenses more effective.

NORAD will remain the important, predominant command, since it is the single agency responsible for aerospace defense of the entire continent, the single agency welding together the aerospace defense forces of the U. S. and Canada.

[fol. 176] To manage the vast aerospace defense system, which extends across the North American Continent from the polar ice cap to the Mexican Border and from east to west far beyond the edges of the continent, NORAD has divided the continent into eight regions. The regions are further divided into sectors. Through this NORAD organization which channels down to the combat weapons, General Kuter exercises control of the air defense forces.

The eight NORAD regions are Alaskan, Northern, 25th, 26th, 28th, 29th, 30th and 32nd which headquarters at Elmendorf Air Force Base (near Anchorage); RCAF Station St. Hubert (near Montreal); McChord AFB Washington; Hancock Field, Syracuse, New York; Hamilton Air Force Base, California; Richards-Gebaur Air Force Base, Missouri; Truax Field, Madison, Wisconsin; and Dobbins AFB, Marietta, Georgia, respectively.

The areospace defense combat forces—the interceptor aircraft, the missiles, the radars, the ships—are provided by the component commands operating under NORAD. These are the RCAF Air Defense Command, which has its headquarters at St. Hubert; and the U.S. Army Air Defense Command, the U.S. Air Force Air Defense Command, and the U.S. Naval Forces, CONAD, with headquarters in Colorado Springs alongside that of NORAD. In all, there are about 200,000 people in the NORAD system.

Defending North America is a 24-hour, seven-day-a-week job. NORAD's efforts are governed by the knowledge that an attack could come at any moment and that the first attack could seriously affect the outcome of the war. NORAD [fol. 177] must be ready every minute of every day to counter an attack. This is NORAD's basic problem—to have its far-flung force ready to react instantly.

Instantly is the important word. The speeds of jet bombers have cut the time available for the defense to carry out its functions of detection, identification, interception, and destruction to a very narrow margin; and the intercontinental ballistic missile would greatly reduce this margin.

The first requirement, therefore, is to get warning of an attack as soon as possible. To lengthen the vital interval between the time of first enemy detection and attack, Canada and the United States have constructed warning lines as far away from the target areas as geographically possible.

Running across the northern rim of the continent in Canadian Arctic and across Alaska is the Distant Early

Warning Line (DEW) of radar stations. The U.S. Navy provides sea flanks of the continent by continuing this line with radar-equipped WV-2 Super Constellations, called Warning Star planes. These mid-ocean lines run from the Aleutians to the mid-Pacific and from Newfoundland to the mid-Atlantic.

Behind the DEW Line, some 600 miles south, lies a second detection system, the Mid-Canada Line. It utilizes doppler detection gear and was built and is manned by Canada. A third warning net, the Pinetree system of radars, built and operated jointly by the U.S. and Canada, cuts across southern Canada. It is now considered a part of the contiguous coverage. South of these lines is a net- [fol. 178] work of radars within the United States. The U.S. contiguous radar system is extended off-shore by U.S. Navy picket ships, and U.S. Air Force RC-121 Super Constellation radar planes. In addition to these, in the Atlantic, USAF radar platforms called Texas Towers are parts of the system.

Thus, the NORAD system is one of early warning plus defense in depth. It provides warning of the approach of the enemy and also the ability to track him continually along his line of approach to target areas in Canada and the United States.

This same defense in depth concept has been carried out in the family of weapons system. This involves the use of RCAF and U.S. Air Force manned interceptors; pilotless interceptors of the BOMARC type, now operational within the USAF and scheduled for utilization by the RCAF; and the shorter range Army missiles of the NIKE family. The aim is to subject an invading aircraft to continuous attack from as far out as possible as it approaches a target area. An enemy bomber would first be attacked by the long-range manned interceptors, next it would be engaged by the BOMARC missile, and finally, if it still survived, the bomber would come within the range of the Nike missiles.

Currently, the fighter interceptor force includes the McDonnell F-101B "Voodoo", the Convair F-102 "Delta

Dagger" and F-106 "Delta Dart", the Navy's Douglas-built F-4D "Skyray", and the Canadian CF-100 "Canuck". In all, there are more than 50 fighter interceptor squadrons in the NORAD system. In an emergency, these forces would be augmented by available fighter aircraft of the U.S. [fol. 179] Navy, U.S. Marine Corps, U.S. Air Force (from commands assigned to other then air defense duties), the Air National Guard, and the interceptor training units of the RCAF Air Defence Command.

A lethal array of armament is available for the combat weapons. The Convair F-102 carries the Falcon missile. When released, the Falcon is guided electronically or by infrared seeker to the target regardless of evasive action taken by the bomber. The Canadian CF-100 is equipped with 2-75 air-to-air rockets. A squadron of Navy interceptors assigned for duty with the NORAD system, flying the F-4D, is armed with the Sidewinder, an infrared heat-seeking missile.

During 1957 the first NORAD interceptor squadrons were equipped with air-to-air missiles capable of carrying nuclear warheads. The F-101B is armed with the atomic tipped MB-1 "Genie" air-to-air rocket. Newest and fastest all-weather fighter interceptor aircraft to join the NORAD arsenal is the Convair F-106. Flying at twice the speed of sound the F-106 "Delta Dart" can accomplish its mission night or day and under any condition of visibility. It is armed with a newer super version of the Falcon utilizing an atomic warhead, and also fires the "Genie" atomic rocket. The F-106 range is considerably greater than any other aircraft presently operated by NORAD.

The MB-1 atomic air-to-air rocket and GAR-11 Falcon atomic guided missile now utilized by NORAD aircraft tremendously increases the kill capability of the fighter-interceptor. When detonated in a formation of enemy bombers, either weapon would wreak havoc on the attack-[fol. 180] ing aircraft. Described as "the most important air defense development since the introduction of radar," the "Genie" was successfully fired in 1957. There is a negligible extent of fall-out from the weapon and the ex-

plosive power of the missile is described as well below nominal. (The nominal weapon is equivalent to 20,000 tons of TNT). The GAR-11 joined the NORAD inventory in the summer of 1960.

Among the surface-to-air missiles employed by NORAD, the Air Force's BOMARC has the longest range. The shorter range, first model Bomarc became operational within NORAD in 1959. The longer range and newer version of the BOMARC is presently under development. Both weapons will have a nuclear capability. The U.S. Army Air Defense Command presently contributes two types of surface-to-air missiles to the NORAD arsenal. The Ajax, which has been employed since early 1954, has much shorter range than the Hercules which is replacing it. The Hercules, already deployed at many strategic locations in the U.S. has an appreciable altitude and range advantage, and is capable of carrying an atomic warhead.

These are the control centers, the radars, and the weapons. Tying them all together is a vast communications network from the DEW Line to NORAD Headquarters in Colorado Springs. The communications system is of great importance. To be of any value, the information from the detection system must be assessed and evaluated. It must be transmitted rapidly and instructions must be given to the interceptor pilots and missile crews. This information must be processed and displayed rapidly and accurately so [fol. 181] that the commander can make continuous estimates of the situation and, if his area is attacked, direct the air battle.

Prior to July, 1958, only a manual system of observing, plotting, and transmitting information was used. This system sometimes produced errors and did not achieve maximum exploitation of the air defense weapons. The capacity of the system to handle mass raids quickly and effectively was limited. Today, NORAD is transitioning from manual operations into the era of automation. A new electronic data-processing system is being installed. This is the Semi-Automatic Ground Environment (SAGE) system. SAGE combines current detection techniques with the use of high-speed electronic digital computers. It is able to receive,

process, and display air surveillance information, and as directed, send guidance instructions, or information to weapons.

A new era in North American aerospace defense began October 1, 1960.

On that day the free world's first missile radar warning station went into action, completing the initial step toward providing the North American Defense Command with the capability to block intercontinental ballistic missile attack against the United States and Canada.

The Ballistic Missile Early Warning System (BMEWS) site at Thule, Greenland, sent test signals southward which activated special displays in the NORAD Combat Operations Center and gave the command's battle staff its first [for 182] look at alert signals similar to those that would warn of an ICBM attack.

NORAD relayed similar displays to Strategic Air Command headquarters in Omaha, Nebraska. The demonstrations at NORAD and SAC were part of a final test to prove the operational readiness of the Thule BMEWS site, 600 miles north of the Arctic Circle. Other portions of the BMEWS system, operated by the USAF, will be turned over to NORAD as they become operational.

The Thule site, which provides radar coverage of the polar routes that would be traveled by the bulk of any ICBM force carrying out a mass raid against North America, is one of three BMEWS stations. The other two will cover the flank approaches to the continent.

The second station is to be located at Clear, Alaska and the third at Fylingdales Moor, Yorkshire, England.

It took two years to design BMEWS and build the Thule station.

The BMEWS stations, each using mammoth detection antennas, will cover the top of the world with scanning beams and provide about 15 minutes warning of a missile attack—time enough to launch a major portion of North America's counterforce. The site at Thule is one of the

largest and most complex military electronic facilities ever built.

[fol. 183] Briefly, this is how the BMEWS surveillance radar will detect missiles as they rise over the horizon several thousands of miles away.

As the radar's antenna system probes the sky it will radiate narrow fans of RF energy at two different degrees of elevation above the earth's surface. These fans will be scanned simultaneously across the face of the huge antenna reflector by means of high-speed scanning switches and a massive array of feedhorns, forming two horizontal detection fans, one above the other.

When a missile passes through the lower fan, radar pulses will bounce off it and be detected by super-sensitive receivers. From these radar echoes, the position and velocity of the missile will be determined. Seconds later, as the missile passes through the upper fan, radar echoes again will be picked up and position and velocity coordinates will be measured. The missile's trajectory then can be calculated from these coordinates since the ballistic missile will be in "free flight" (unpowered phase of its trajectory) as it passes through the radar fans. Calculation of the missile's trajectory will permit prediction of the impact area, impact time and point of launch. Data processing equipment installed here at the site will rapidly compute these data and flash a warning to NORAD where the information will be relayed to the display facilities of strategic striking forces.

The nerve center and hub of this vast system is the NORAD Combat Operations Center in Colorado Springs where air traffic information from the entire warning system is received and evaluated. A new, electronic display [fol. 184] system, known as "Iconorama", is being installed in the center, eliminating the time lags of manual plotting methods used in the past.

Iconorama permits observers to see, almost instantaneously, the positions of airborne objects thousands of miles away and over any part of the continent covered by radar

networks. The system flashes air surveillance data on a large screen similar in appearance to those used in movie theaters.

This Center is connected by the NORAD communications system to all its subordinate commands and to every command post on the continent and throughout the world. From here an attack warning would be given to the air defense system, to Ottawa and Washington, D.C., to the Strategic Air Command, the Office of Civil and Defense Mobilization, to the Pentagon, etc. The battle for North America would be monitored from this operations center.

This whole NORAD system is triggered for action at the first warning of an impending attack. Watching the skies over and around the continent is the first step. The radars are operating 24 hours a day. Detection, however, must be followed by rapid and accurate identification. Identification is always a problem, particularly during the progress of an air battle when safe passage of SAC aircraft must be guaranteed. The provisions of a plan called "SCATER", (Security Control Air Traffic and Electomagnetic Radiations), providing for the immediate grounding or diverting of all civil and non-tactical military aircraft within the boundaries of the United States are invoked by the North American Air Defense Command in cooperation [fol. 185] with the Federal Aviation Agency (FAA). In the Northern NORAD Region a similar plan called "ESCAT" (Emergency Security Control Air Traffic) is being developed with the Department of Transport (DOT) to control air traffic in Canada in an emergency.

However, because the enemy can choose the time and place of an attack and will probably use the normal friendly air traffic as a screen, NORAD must know the identity of aircraft over or approaching the continent at all times. Identification is primarily accomplished by a system of flight plan checking and matching. Certain areas off the coast of the continent are designated as Air Defense Identification Zones (ADIZ). When a pilot intends to fly into or through one of these zones, he must file a flight plan. Where an aircraft approaches the coastline and enters the

ADIZ, the detection system establishes a radar contact with it. The flight plans are checked with the radar plot. If they match, allowing for certain tolerances, the aircraft is classified as friendly. If the flight plan does not match with the radar plot, or if there is any doubt, an interceptor is "scrambled" to make visual identification.

If intelligence sources indicated even a remote possibility of attack, NORAD could go from a normal condition of readiness to full preparedness via a series of Defense Readiness Conditions (DEFCONS) preparing the system for any eventuality. Under these conditions, NORAD would, among other things, place more weapons on advanced status of alert, defer most training, intensify internal security measures, and make ready extra communications lines. Should NORAD then receive definite information of an attack, it would go to Air Defense Emer- [fol. 186] gency, the highest state of preparedness by both military forces and civilian agencies, whereby all air defense measures are readied for use. When a condition of Air Defense Emergency is declared, an Air Defense Warning Red, Warning Yellow, or Warning White will be issued to signify that an attack is imminent or actually under way, probable, or not immediately probable.

These conditions of readiness would not necessarily be followed in sequence. NORAD might find it necessary to go directly from a normal condition to an emergency condition with planes and missiles ready for immediate employment.

When NORAD declares changes in conditions of readiness or issues air defense warnings, U.S. and Canadian military installations, and key civilian agencies such as the Federal Aviation Agency (FAA) and Department of Transport (DOT), the Office of Civil and Defense Mobilization (OCDM), and the Federal Civil Defence of Canada (FCDC), are immediately notified. These agencies, as the situation requires, further disseminate the warning. The OCDM has a warning system operating around the clock with more than 375 warning points in the U.S. The OCDM system can transmit an air raid warning to the nation and receive acknowledgments from each state in less than two minutes.

Under an Air Defense Emergency condition, the NORAD system would be put on a full war footing with missiles and planes ready to go.

The FAA would ground or divert non-military traffic under Scater and the Federal Communications Commis- [fol. 187] sion would close down radio and television stations within the U.S. to prevent homing on them, under the Conelrad plan. Civil defense instructions would be broadcast under this plan over two radio bands—640 and 1240 kilocycles. The augmentation forces of the other services, the Air National Guard and the Reserve would be called up and made ready.

Realization of the possibility that war, if it comes again, might reach the North American Continent itself was in the minds of responsible leaders of Canada and the United States even before the forces of the last war were unleashed.

President Roosevelt, when receiving an honorary degree at Queen's University at Kingston, Ontario in 1938, made the first formal commitment of the United States to aid in the defense of Canada when he declared in memorable and historic words:

"Canada is part of the sisterhood of the British Empire. I give to you the assurance that the people of the United States will not stand idly by if domination of Canadian soil is threatened by any other empire".

Two days later at Woodbridge, Ontario, Prime Minister King announced the complementary obligation on the part of Canada when he announced that Canada would see to it that:

"Should the occasion ever arise, enemy forces should not be able to pursue their way either by land, sea, or air to the United States across Canadian Territority".

[fol. 188] Thus was notice served on all the world by both Canada and the United States that henceforth both countries were committed to a co-operative system of mutual self-defense.

EXHIBIT B TO DEPOSITION

The United States Army Air Defense Command.

Headquarters North American Air Defense Command
NORAD

Office of Information

Phone Melrose 5-8911
Ext 2387

Colorado Springs,
Colorado

The mission of the United States Army Air Defense Command is to provide combat-ready Army air defense forces to the Commander-in-Chief, North American Air Defense Command, for air defense of specified critical locations. USARADCOM's contribution of forces to the air defense system includes surface-to-air missile units which shield major "target" centers of the United States.

USARADCOM's concept of defense is a combination of men, weapons, and determination that will prevent enemy aircraft or missiles from making a successful attack upon defended areas. Under this concept, the primary goal is to deter an enemy from an air assault on the United States [fol. 189] by making him see in advance that his probable losses are not worth the risk. If that deterrent fails, the goal then is to deny the enemy destruction of the centers of America's great retaliatory and productive might. USARADCOM is a major component of the North American Air Defense Command, a unified command which is charged with the over-all mission of air defense of the North American continental. NORAD has full operational command of Army air defense forces assigned to continental defense, as well as those forces also contributed to this system by the U. S. Air Force Air Defense Command, U. S. Naval Forces, NORAD, and operational control of the forces of the Air Defense Command of the Royal Canadian Air Force.

Air defense is recognized as a joint task in which the Army shares responsibility with its sister services. Each component of NORAD contributes those forces which it is best suited by experience to train, equip, and sustain as an effective element of this single, unified system.

The component structure is designed to give the continental air defense system true depth. This "defense in depth" strategy combines the dimensions of distances with that of a variety of weapons. The enemy would be met and engaged not only along the full range of his attack, but by different weapons.

The rapid deterioration of the international situation in 1948 prompted the decision to undertake a speedy expansion of the United States Army's antiaircraft artillery. In 1949 antiaircraft battalions were moved to training centers near some of the cities which they were ultimately to defend. A few months later batteries were deployed at their defense sites.

[fol. 190] The United States Army Air Defense Command was established by General Order Number 20, Department of the Army, July 1, 1950, four days after the invasion of South Korea. It was known then as the Army Antiaircraft Command.

Early armament included the 90 millimeter guns, which were the backbone of Army antiair defenses in World War II, and the big 120mm guns. Later the 75mm "skysweeper" was added to the conventional antiaircraft artillery. Units armed with those antiaircraft guns formed the nationwide Army organization into which guided missiles were effectively phased, commencing with the deployment of Nike-Ajax missile units to the Washington-Baltimore defense in 1953.

From the beginning the command was responsible for planning and deployment of antiaircraft battalions, and coordinating the training and readiness of the units. The headquarters did not begin to exercise the full functions of command until April 10, 1951. At that time all antiaircraft units allocated to the air defense of the United States came under command of the headquarters.

On September 1, 1954, by direction of the Secretary of Defense, elements of all military services with air defense capabilities were combined into a single air defense system with headquarters in Colorado Springs. The new command, directed by the Joint Chiefs of Staff with the U.S. Air Force as executive agent, included the U.S. Army Air Defense Command, the U.S. Air Force Air Defense Command, and U. S. Naval Forces, CONAD. The command was designated the Continental Air Defense Command (CONAD).

[fol. 191] In August, 1957, CONAD became an integrated Canadian-United States headquarters and was redesignated as the North American Air Defense Command (NORAD). Under the reorganization in January, 1959, it became a unified command without one service acting as executive agent.

In the United States, NORAD reports to the Joint Chiefs of Staff, and in Canada to the Chiefs of Staff Committee.

Sentinel

LOS ANGELES AIR DEFENSE SECTOR

The SENTINEL is an Official Class 5 Air Force newspaper published monthly by and for the personnel of the Los Angeles Air Defense Sector (LAADS), a unit of the Air Defense Command, at Norton Air Force Base, California. The SENTINEL receives the Air Force News Service, NORAD News Service and Armed Forces Press service material. AFPS material appearing herein will not be reprinted without written permission of Armed Forces Press Service, 220 East 42nd Street, New York 17, New York.

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[fol. 193]

WHAT IS NORAD?

The NORAD concept represents an outgrowth of World War II experience. To coordinate the allied effort in Europe and the Far East, combined commands were necessary where one commander and his staff controlled all the various services and national forces in one combined force. When the air defense forces began building in the early 1950's, it soon became evident that more than air force units were necessary for adequate air defense. In 1954, the combined command—the Continental Air Defense Command—was established. It was responsible directly to the Joint Chiefs of Staff. In September 1957, Canadian forces were included and NORAD was established on an interim basis. The NORAD command was made official in May 1958. It is the first two-country all-services type of military command ever to operate on the North American continent.

NORAD's Commander-in-Chief, General Laurence S. Kuter, is responsible to both the U.S. Joint Chiefs of Staff and to the Canadian Chiefs or Staff Committee. General Kuter's Deputy is the Royal Canadian Air Force's Air Marshall C. Roy Slemon. The Chief of Staff of NORAD is an Army General. On down the line in the combined command, there are RCAF, Army, Navy, Marine, and Air Force staff officers.

The NORAD command is an operational one. It is responsible for fighting the air defense battle as well as coordinated planning and programming. In fighting the air battle it uses the forces supplied to it by the component commands. These are major commands of their respective services, the U.S. Army, Navy and Air Force, and the Canadian, RCAF Air Defence Command.

Each of the respective services is responsible for supply, maintenance, administration and training for its own personnel and equipment. The primary mission of the component commands is to equip and maintain trained combat-ready forces available at a moment's notice on call from the Commander-in-Chief, NORAD. In all, there are about 200,000 people in the NORAD system.

Illustrating the NORAD organization is the Los Angeles NORAD Sector, Brig Gen Richard T. Kight, Commander, has army, navy and marine deputies on his staff. He has operational control of ten air force radar sites, three air force and one navy fighter-interceptor squadrons, and an army NIKE brigade comprising some 16 missile batteries. In addition, there are navy picket ships and air force airborne radar operating off the California coast and working with the LA Sector. There are also available three air national guard fighter-interceptor squadrons. And in the event of emergency, he can call on augmentation forces of navy, marine and air force fighter units, both regular and reserve. All of these units, including the augmentation forces, train with the sector and have a good combat potential.

General Kight is also commander of the air force component, the Brigadier General Honeycutt commands the 47th Artillery Brigade, with headquarters at Fort MacArthur. Captain Trudeau commands the naval component, the navy's All-Weather Fighter Squadron Three located on North Island Naval Air Station.

This organization is a working and highly efficient combined command. Their effectiveness is testified to by successive outstanding performanees in tactical evaluation. The Sector has been awarded the Air Defense Command's "A" Award in recognition of this performance.

It should be remembered in reviewing the NORAD system that the NORAD Sector with its SAGE Direction Center is the basic combat command for the air defense battle. Within the United States, some 21 sectors are tied into seven SAGE Division or NORAD Region Control Centers which are also tied into the NORAD Combat Operations Center in Colorado Springs.

Just as the air defense battle will know no borders, the air defense organization flows smoothly north of the US border into Canada toward Alaska and Greenland. The RCAF-operated Northern NORAD Region and its NORAD Sectors stretch across Canada. The Alaskan NORAD Region is controlled from Elmenforf AFB. The Labrador, Newfoundland and Greenland area is controlled from the

64th NORAD Region with headquarters at Stewart AFB, New York.

The continental United States is divided into seven NORAD regions, corresponding to the 25th, 26th, 28th, 29th, 30th, 32nd and 33rd SAGE Air Divisions. Each of the NORAD regions is further divided into sectors. The 28th NORAD Region, for instance, is presently divided into the [fol. 194] Los Angeles and San Francisco NORAD Sectors. In the near future the Los Angeles Sector will split off the Phoenix Sector, and the San Francisco Sector will split off the Reno Sector as SAGE Direction Centers become operational in those areas.

Defending North America is a 24-hour, seven-day-a-week job. NORAD's efforts are governed by the knowledge that an attack could come at any moment and that the first attack could seriously affect the outcome of the war.

The first requirement, therefore, is to get warning of an attack as soon as possible. To lengthen the vital interval between the time of the first enemy detection and attack, Canada and the U.S. have constructed warning lines as far away from our vital areas as geographically possible.

Running clear across the northern rim of the continent in the Canadian Arctic and across Alaska is the Distant Early Warning (DEW) Line of radar stations. The U.S. Navy provides sea flanks of the continent by continuing this line with radar-equipped destroyer escorts and WV-2 Super Constellations from the Aleutians to the mid-Pacific and from Newfoundland to the mid-Atlantic.

Behind the DEW Line, some 600 miles south, lies a second detection system, the Mid-Canadian Line. It utilizes doppler detection gear and was built and is manned by Canada. A third warning net, the Pinetree system of Radars, built and operated jointly by the U.S. and Canada, cuts across southern Canada. South of these lines is a network of radars within the United States. The U.S. contiguous radar systems is extended off-shore by U.S. Navy picket ships, and the U.S. Air Force RC-121 Super Constellation radar planes.

Thus, the NORAD system is one of early warning plus defense in depth. It provides warning of the approach of

the enemy and also the ability to track him continually along his line of approach to target areas in Canada and the United States.

This same defense in depth concept has been carried out in the family of weapons system. The aim is to subject an invading aircraft to continuous attack from as far out as possible as it approaches a target area. An enemy bomber would first be attacked by long range manned intereceptors, next it would be engaged by the BOMARC missile, and finally, if it still survived, the bomber would come within the range of the NIKE missiles.

Currently, the fighter intereceptor force includes the Mc Donnell F-101 "Voodoo", the Convair F-102 "Delta Dagger", and F-106 "Delta Dart", the Northrop F-89J "Scorpion", the North American F-86L, the Navy's Douglas-built F-4D "Skyray", and the Canadian CF-100 "Canuck".

A lethal array of armament is available for the combat weapons. The Convair F-102 carries the Falcon missile. When released, the Falcon is guided either electronically or by infra-red seeker, to the target regardless of evasive action taken by the bomber.

Newest and fastest all-weather fighter interceptor aircraft to join the NORAD arsenal is the Convair F-106. Flying at twice the speed of sound the F-106 "Delta Dart" can accomplish its mission night or day and under any condition of visibility. It is armed with a newer super version of the Falcon and also fires the "Genie" Atomic Rocket. The F-106 range is considerably greater than any other aircraft presently operated by NORAD.

The MB-1 atomic air-to-air rocket now utilized by the F-101B and F-89J tremendously increases the kill capability of the fighter-intereceptor. When detonated in a formation of enemy bombers, the "Genie" would wreak havoc on the formation of attacking aircraft. Described as "the most important air defense development since the introduction of radar", the "Genie" was successfully fired in 1957. There is a negligible extent of fall-out from the weapon and the explosive power of the missile is described as well below nominal. (The nominal weapon is equivalent to 20,000 tons of TNT).

Among the surface-to-air missiles employed by NORAD, the Air Force's BOMARC will have the longest range. It has a nuclear capability. The U.S. Army Air Defense Command presently contributes two types of surface-to-air missiles to the NORAD arsenal. The AJAX, which has been employed since early 1954, has much shorter range than the HERCULES which is replacing it. The HERCULES, already employed at many strategic locations in the U.S., has an appreciable altitude and range advantage, and is capable of carrying an atomic warhead.

Prior to July 1958, only a manual system of observing, plotting, and transmitting information was used. Today, NORAD is transitioning from manual operations into the era of automation. A new electronic Ground Environment [fol. 195] (SAGE) System, the first unit of which became operational in July 1958 in the New York area. SAGE will combine current detection techniques with the use of high-speed electronic digital computers. It will be able to receive, process, and display air surveillance information and, as directed, send guidance instructions, or information to weapons.

These are the direction centers, the radars and the weapons. The nerve center and hub of this vast system is the NORAD Combat Operations Center in Colorado Springs. Here, information from the whole system is fed to personnel who plot the air situation over every part of the board. This center is connected by the NORAD communications system to all its subordinate commands and to every command post on the continent and throughout the world. From here an attack warning would be given to the air defense system, to Ottawa and Washington, to the Strategic Air Command, the Office of Civil and Defense Mobilization, to the Pentagon, etc. The battle for North America would be monitored from this operations center.

This whole system is triggered for action at the first warning of an impending attack. Watching the skies over and around the continent is the first step. The radars are operating 24 hours a day. Detection, however, must be followed by rapid and accurate identification.

However, because the enemy can choose the time and place of an attack, NORAD must know the identity of aircraft over or approaching the continent at all times. Identification is primarily accomplished by a system of flight plan checking and matching. When an aircraft approaches the coastline and enters the ADIZ, the detection system establishes a radar contact with it. The Flight plans are checked with the radar plot. If they match, allowing for certain tolerances the aircraft is classified as friendly. If the flight plan does not match with the radar plot, or if there is any doubt, an interceptor is "scrambled" to make visual identification.

If intelligence sources indicated even a remote possibility of attack, NORAD would go from a normal peacetime condition of readiness into an increased readiness posture. Under this condition of readiness, NORAD would, among other things, place more weapons on advanced status of alert, defer most training, intensify internal security measures, and make ready extra communications lines. Should NORAD then receive more definite information of an attack, it would go to a Maximum Readiness posture. When this condition of readiness was declared, NORAD would also declare either an Air Defense Readiness (Maximum preparedness by the military) or an Air Defense Emergency. (Maximum preparedness by both military forces and civilian agencies).

When NORAD declares changes in conditions of readiness or issues air defense warnings, U.S. and Canadian military installations, and key civilian agencies such as the Federal Aviation Agency (FAA) and Department of Transport of Canada (DOT), the Office of Civil and Defense Mobilization (OCDM), and the Federal Civil Defence of Canada (FCDC), are immediately notified. These agencies, as the situation requires, further disseminate the warning. The OCDM has a warning system operating around the clock with some 276 warning points in the U.S. The OCDM system can transmit an air raid warning to the nation and receive acknowledgements from each state in less than two minutes.

NIKE HERCULES DESTROY SISTER MISSILE AT MACH 7

Washington (AFPS) — Nineteen miles above the White Sands Missile Range, a Nike Hercules destroyed another missile of the same type in its toughest test to date. It is the highest known kill of such a fast moving target.

The test was designed to prove new and improved guidance and detection equipment's ability to track an extremely small target of high speed and altitude capability.

Invisible to the naked eye at the extreme altitude, the Hercules intercepted its counterpart with a terrific flash. Two two missiles approached each other at combined speeds exceeding Mach 7.

[fol. 196]

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

Civil Action No. 1731

UNITED STATES OF AMERICA for the use of H. W. MOSELEY d/b/a MOSELEY PLUMBING AND HEATING COMPANY,

vs.

ELECTRONIC & MISSILE FACILITIES, INC., FORMERLY, FIVE BORO CONSTRUCTION CORPORATION, and CONTINENTAL CASUALTY CO.

OPINION AND ORDER—September 21, 1961

Bootle, District Judge:

In this Miller Act suit the petitioner, Moseley, d/b/a Moseley Plumbing and Heating Company, a subcontractor, sues the defendant, Electronics and Missile Facilities, Inc., formerly Five Boro Construction Corporation, and its surety alleging that Moseley has performed all the work called for by the subcontract plus the work called for by change orders and also additional work at defendants' direction. The suit is in several counts, some of which seek

recovery on a quantum meruit basis and some seek recision of the contracts[1] on account of fraud. The suit alleges that the contracts purport to provide for arbitration of any claim arising thereunder and that notwithstanding the fact that all of the work which Moseley was required to perform and did perform under its subcontract, namely the furnish- [fol. 197] ing of material and labor for "all plumbing, heating, installation of sewage treatment plants, air conditioning, ventilating, installation of government furnished generator units, supply lines, waterpump house, sewers and storm drainage work required under the principal contract" was done in the Middle District of Georgia, the defendant Five Boro had filed in the Supreme Court of the State of New York a purported arbitration proceeding and had procured up there a Court order purporting to set a hearing up there and had served notice thereof upon Moseley, and unless restrained and enjoined by the Court would proceed with said purported arbitration proceeding to the irreparable injury and damage of Moseley. This Court granted a temporary restraining order which by consent has continued in force and effect pending the further order of this Court. For decision now is defendants' motion to dismiss the complaint or in lieu thereof to stay this suit "until an arbitration shall be had in accordance with the terms and conditions of the contract."

The question presented is this: assuming but not deciding that the subcontract here sued upon comes within the ambit of section 2 of the Arbitration Act, 9 U.S.C.A. §2 (1947), as being "a contract evidencing a transaction involving commerce", can section 4 of the arbitration act be invoked in a Miller Act case so as to compel unwilling[2] arbitration? This Court has reached the conclusion that it cannot and this conclusion is based upon the fact that after the Arbitration Act had been on the books for ten years

[1] There are two contracts sued on. They are identical except as to amounts and except that one relates to Nike-Hercules facilities "Robins Air Force Base Defense Area, Georgia", and the other to Nike-Hercules facilities "Tanner Air Force Base Defense Area, Georgia."

[2] Tojas Development Co. v. McGough Bros., 165 F. 2d 276, 280, (5th Cir., 1947).

(1925 to 1935) with its provisions in section 4 for com-
[fol. 198] pelling arbitration, then in 1935 the Congress enacted the Miller Act with the provision that suits of the type here involved shall be brought "In the United States District Court for any district in which the contract was to be performed and executed AND NOT ELSEWHERE", 40 U.S.C.A. §270b(b), and with its even more explicit provision that persons occupying the position of Moseley "SHALL HAVE THE RIGHT TO SUE ON SUCH PAYMENT BOND for the amount, or the balance thereof, unpaid at the time of institution of such suit AND TO PROSECUTE SAID ACTION TO FINAL EXECUTION AND JUDGMENT FOR THE SUM OR SUMS JUSTLY DUE HIM." 40 U.S.C.A. §270b(a). (Emphasis added.) The instant case strikingly demonstrates the purpose of Congress in thus providing an exclusive venue, and, it is believed, an exclusive forum for the resolution of Miller Act disputes. The inherent inconvenience and injustice of Moseley's being forced to transport himself, his records, and his witnesses from the scene of the activities under investigation to a point so distant as New York City is from Macon, Georgia is readily apparent. With section 4 of the Arbitration Act, in the background of Congress' thinking, it said that persons proceeding under the Miller Act "SHALL HAVE THE RIGHT TO SUE . . . AND TO PROSECUTE . . . TO FINAL EXECUTION AND JUDGMENT." 40 U.S.C.A. §270b(a) (Emphasis added). The Courts are not at all adverse in proper cases to preserving the right of Court trial against attempted enforced unwilling arbitration, or against attempts to limit the jurisdiction of the Courts where it is clear that the Congressional purpose is contra to the attempted limitation of jurisdiction Wilko v. Swan, 346 U. S. 427 (1953) (Securities Exchange Act); Boyd v. Grand Trunk W.R. Co., 338 U. S. 263 (1949) (Federal [fol. 199] Employers' Liability Act); Brooklyn Bank v. O'Neil, 324 U. S. 697 (1945) (Fair Labor Standards Act); Krenger v. Pennsylvania R. Co., 174 F. 2d 556 (2d Cir. 1949) (Federal Employers' Liability Act); Akerly v. New York Cent. R. Co., 168 F. 2d 812, 815 (6th Cir. 1948) (Federal Employers' Liability Act); Reader v. Hirsch & Co., Civil Action 61-1979 (S.D.N.Y. August 1, 1961) (Securities

Exchange Act); United States v. Holloway Company, 126 F. Supp. 347 (D. N. Mex. 1954) (Miller Act). The various advantages of Court trial over arbitration are pointed out in Bernhardt v. Polygraphic Co., 350 U. S. 198, 202-203 (1956), and in Wilko v. Swan, supra.

"The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a Court of law to an arbitration panel may make a radical difference in ultimate results. Arbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment. . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a Court trial; and judicial review of an award is more limited than judicial review of a trial." 350 U. S. at 203.

As was aptly said by Judge Dawson in the Reader case, supra:

"Thus parties have not been permitted to waive their statutory rights in advance of the existence of a controversy (as opposed to settlement of a disputed claim, which is generally permitted) where either the statute contains a non-waiver provision OR THE CONGRESSIONAL PUR-
[fol. 200] POSE WOULD BE THWARTED THEREBY." (Emphasis added.)

In this instance we do not have a statutory non-waiver provision but we have, it is believed, a clear expression of congressional purpose.

Another reason why this action should not be stayed is that the suit seeks to cancel or rescind for fraud both of the subcontracts. Should that phase of the suit be successful the entire contracts would be rescinded including the agreement for arbitration. Lytle v. Scottish American Company, 122 Ga. 458, 466.

While two physical precedents may be found where Miller Act suits were stayed and arbitration directed, both in the Fourth Circuit, (Agostini Bros. Building Corp. v. United States, 142 F. 2d 854 (1944), and United States v. Al-Con Development Corp., 271 F. 2d 904 (1959), an examination of those decisions indicates that the Court in those cases was not invited to rule upon the specific question here involved, namely, whether in enacting the Miller Act, the

Congress intended to provide an exclusive venue and forum to the exclusion of enforced, unwilling arbitration.

Accordingly, defendants' motion to stay this action and all proceedings herein until arbitration shall be had is hereby overruled and denied.

Likewise, defendants' motion to dismiss the complaint and each and every count thereof on the ground that the complaint fails to state a claim against defendants upon which relief can be granted is hereby overruled and denied in accordance with the rule of law that "a complaint should [fol. 201] not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U. S. 41, 45-46 (1957); Mitchell v. E. Z. Way Towers, Inc., 269 F. 2d 126, 136 (5th Cir. 1959).

Likewise, and in accordance with said quoted rule, defendants' motion to strike plaintiff's allegations seeking to recover attorneys' fees and other expenses of litigations seeking to recover attorneys' fees and other expenses of litigation is also overruled and denied.

So Ordered, this 21 day of September, 1961.

W. A. Bootle, United States District Judge.

IN UNITED STATES DISTRICT COURT

AMENDED ORDER—October 2, 1961

The Court's order entered in this case on September 21, 1961 is hereby amended by adding at the end thereof the following sentence:

"The restraining order previously entered by the Court in this case is hereby continued in full force and effect."

[fol. 202] This 2 day of October, 1961.

W. A. Bootle, Judge, United States District Court.

[fol. 206] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 207]
MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 16, 1962
(omitted in printing)

[fol. 208]
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19351

ELECTRONIC & MISSILE FACILITIES, INC. (formerly Five Boro Construction Corporation) and CONTINENTAL CASUALTY COMPANY, Appellants,

versus

UNITED STATES OF AMERICA for the use of H. W. MOSELEY d/b/a MOSELEY PLUMBING AND HEATING COMPANY, Appellee.

Appeal from the United States District Court for the Middle District of Georgia

OPINION—July 11, 1962

Before Tuttle, Chief Judge, and Rives and Jones, Circuit Judges.

Tuttle, Chief Judge: The appellant, Electronic & Missile Facilities, Inc., was prime contractor with the United States Government for the construction of Nike Hercules Facilities at Robins Air Force Base and Turner Air Force Base within the Middle District of Georgia. The appellee, [fol. 209] Moseley, was a subcontractor on both projects, and was primarily responsible for the plumbing, heating and air conditioning work. This suit was instituted in the District Court for the Middle District of Georgia by the United States in behalf of the appellee under the provisions of the Miller Act, 40 U.S.C. §270 a-d. The complaint alleged that approximately $125,000 was due Moseley for work performed under the subcontracts, and that the appellant[1]

[1] The other appellant, Continental Casualty Company, provided the bond for Electronic & Missile Facilities, Inc. The instant suit was brought on the bond as provided by the Miller Act. Electronic & Missile Facilities, Inc. will be referred to as "the appellant" in this opinion.

had breached the subcontracts by refusing to pay. In the alternative, the complaint sought to rescind the contracts for fraud, and to recover for the work performed on a quantum meruit basis. The appellant moved to stay the action on the ground that both subcontracts expressly provided for arbitration of all disputes in New York City.[2] The District Court held that arbitration was contrary to the policy underlying the Miller Act, and the Court therefore enjoined the appellant from proceeding with arbitration in accordance with the provisions of the subcontracts. The appellant brought this appeal pursuant to 28 U.S.C. §1292 (a) (1). We have concluded that the District Court erred in enjoining arbitration.

The United States Arbitration Act provides that an arbitration provision in any contract "evidencing a transaction involving commerce" shall be "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The Arbitration Act further provides that:

> [fol. 210] If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing that the applicant for the stay is not in default in proceeding with such arbitration. 9 U.S.C. §3.

It is clear, first of all, that since the construction of the missile facilities in Georgia required substantial interstate

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[2] The arbitration provisions related to "[a]ny controversy or claim arising out of or relating to this agreement or the breach thereof. . . ."

movement of materials and personnel,[3] the contracts here in issue come within the purview of the Arbitration Act as contracts "evidencing a transaction involving commerce." *Metro Industrial Painting Corp., et al.* v. *Terminal Construction Company, Inc.*, 2 Cir., 287 F. 2d 382. Nevertheless, the District Court held the Arbitration Act inapplicable to the instant case on the theory that a contrary holding would [fol. 211] nullify the provisions of the Miller Act requiring the appellee to sue in the District Court for the Middle District of Georgia and giving him the right to prosecute the suit to final execution and judgment.[4]

We find this theory wholly unconvincing. The venue provision of the Miller Act, requiring that suit be brought in the District where the contract was performed, was obviously not designed to favor Miller Act plaintiffs. Had

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[3] As the appellant states in its brief:

"Under the facts in the case at bar, appellants are engaged in commerce regardless of which test is applied. It is undisputed in the record that appellant, ELECTRONIC & MISSILE FACILITIES, INC., a New York corporation, contracted with appellee, a Georgia corporation, to do work within the state of Georgia; that appellant sent substantial supervisory personnel across state lines; and received supplies and equipment across state lines. Working on the project were subcontractors from states other than Georgia. Moreover, the facility involved is an integral part of a transcontinental system joined and holding hands with facilities already in commerce in other states and countries by radios and telephone communications, and further joined with numerous other military bases already in commerce from almost the North Pole to Puerto Rico in a single giant network of air bases and communication facilities."

[4] The Miller Act provides:

"Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit." As amended Aug. 4, 1959, Pub. L. 86-135, §1, 73 Stat. 279. 40 U.S.C. §270b (b).

Congress meant to make things easy for such plaintiffs, it would have provided them with a choice of forums in which to bring suit. As this Court noted in *Texas Construction Company* v. *United States*, 5 Cir., 236 F. 2d 138 at page 143:

> "... the requirement as to the district in which suit may be filed, contained in the Miller Act, is only one for the benefit of the defendants and may thus be waived by them, as may any other question of venue."

It seems clear, therefore, that the appellee will not be deprived of any substantial right if it is forced to comply with its voluntarily assumed obligation to arbitrate in New York City.

[fol. 212] The Federal Employers' Liability Act[3] cases relied on by the appellee and the District Court are plainly inapposite to the case at hand. Section 6 of that Act permits an injured employee to select any of three forums in which to press his claim. This provision was clearly and unmistakably enacted for the benefit of Liability Act plaintiffs. By providing a choice of three forums for the often impecunious workingman, Congress sought to assure that he would not be dissuaded or prevented from obtaining relief by the necessity of having to litigate his claim in an inconvenient forum. Thus, in *Boyd* v. *Grand Trunk Western Railroad Company*, 338 U. S. 263, the Supreme Court invalidated a contract provision restricting the plaintiff's choice of forums on the ground that:

> "... petitioner's right to bring this suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of §5 of the Liability Act: 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void....'"
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> "The right to select the forum granted in §6 is a substantial right. It would thwart the express purpose

[3] 45 U.S.C. §51.

of the Federal Employers' Liability Act to sanction defeat of that right by the device at bar." 338 U. S. at pages 265, 266.

[fol. 213] The Miller Act does not give a plaintiff the "right to select" his forum. Rather, it provides that the action must be commenced in the district where the contract was performed. This provision, as noted above, is for the benefit of the defendant, not the plaintiff, and the plaintiff is therefore not deprived of any substantial right if he is compelled to carry out his contract to litigate partially outside the district where the contract was performed.

Even apart from the question of venue, the District Court held that the Miller Act precluded arbitration, wherever conducted, because it would negate appellee's right under the Act to press his claim in a court of law, and to "prosecute the suit to final execution and judgment." This theory must be rejected for essentially two reasons. First, there is absolutely nothing in the language or legislative history of the Miller Act which indicates that Congress meant to prohibit a laborer or materialman from voluntarily substituting the procedure of arbitration for his right to litigate in a federal court. On the other hand, the United States Arbitration Act expressly and unequivocally gave the parties the right to provide for arbitration of all disputes arising under their contracts. The District Court's decision, in effect, repeals the Arbitration Act as applied to Miller Act suits even though there is not the slightest indication anywhere that Congress meant this to be so.

Secondly, the appellee has not even attempted to demonstrate how or why he would be prejudiced by having this dispute settled by arbitration rather than in the federal courts. If it could be shown that disputes arising under the Miller Act involve complicated and sophisticated legal issues which cannot readily be resolved by arbitrators un- [fol. 214] trained in the law, we would perhaps be more willing to read into the Miller Act provision giving the appellee the right to sue in the federal courts a prohibition against having the dispute settled anywhere else. But such is not the case. This dispute involves nothing more than

the rights and liabilities of two business concerns under ordinary business contracts. It is precisely the type of commercial dispute which is, and has always been thought to be, a proper subject for arbitration.

Indeed, the case most strongly relied on by the appellee demonstrates the fallacy in its argument. That case is *Wilko* v. *Swan*, 346 U. S. 427, where the Supreme Court held that an arbitration agreement could not prevent a defrauded purchaser of securities from suing the selling under the provisions of the Securities Act of 1933. The rationale of that decision can be gleaned from the following quotation from the Court's opinion:

> "Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity *or the amount of money due under a contract is not the type of issue here involved.* This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of [fol. 215] proof,' 'reasonable care' or material fact cannot be examined." [Emphasis added].
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> 346 U. S. at 435-436.

Unlike the *Wilko* case, however, the instant case *does* involve "the amount of money due under a contract," the type of issue which the Court's opinion in Wilko indicates is properly referable to arbitration. Indeed, it is significant that, as an illustration of a case concerning "the amount of money due under a contract," the Supreme Court cited *Agostini* v. *United States*, 4 Cir., 142 F. 2d 854, where the Fourth Circuit held that a suit under the Miller Act could be stayed for arbitration proceedings.

Apart from the *Agostini* case, other cases indicating that arbitration is allowable in a Miller Act setting are *United*

States v. *Bregman Construction Corp.*, 6 Cir., 256 F. 2d 851 and *United States* v. *Al-Con Development Corp.*, 4 Cir., 271 F. 2d 851.[6] Although the contention here urged was not really analyzed in the above cited cases, apparently due to the failure of the plaintiffs therein to press the point that the Miller Act precluded arbitration, it is significant that the Court in the *Bregman* case, stated flatly:

> "Without question, in a proper situation, the Arbitration Act applies in proceedings under the Miller Act."
> 256 F. 2d at 853.

Having concluded that the Miller Act did not preclude the appellant from proceeding with arbitration, one further [fol. 216] point remains to be considered. As an additional reason for its decision, the District Court stated:

> "Another reason why this action should not be stayed is that the suit seeks to cancel or rescind for fraud both of the subcontracts. Should that phase of the suit be successful the entire contracts would be rescinded including the agreement for arbitration. Lytle v. Scottish American Company, 122 Ga. 458, 466."

Where a contract comes within the purview of the United States Arbitration Act, federal not state, law controls as to whether a claim of fraud precludes arbitration of a dispute arising under the contract. *Robert Lawrence Company* v. *Devonshire Fabrics*, 2 Cir., 271 F. 2d 402. Under federal law, arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision itself was fraudulently procured. *Robert Lawrence Company* v. *Devonshire Fabrics*, *supra*. Since the appellee did not specifically claim that the provision for arbitration was procured by the fraud of the appellant,[7] we hold that the District Court erred in

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[6] The appellee has not cited a case to the contrary.

[7] The appellee did not allege that he was induced to enter into the agreements for arbitration through the fraud of the appel

concluding that the appellee's claim for rescission of the contracts on the ground of fraud was a bar to arbitration. [fol. 217] The judgment is Reversed and the cause Remanded to the District Court for further proceedings consistent with the views expressed in this opinion.

RIVES, Circuit Judge, Dissenting:

I agree with the district court's appraisal of the intention of Congress with respect to the two Acts here involved. The Arbitration Act enacted in 1925 is limited in its application to issues "referable to arbitration under an agreement . . ." 9 U.S.C.A. §3. Ten years later the Miller Act was enacted in 1935 with the provision that suits of the type here involved shall be brought "in the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere*" (emphasis supplied), 40 U.S.C.A. §270b (b), and with its even more explicit provision that every person who has furnished labor or material and has not been paid therefor within ninety days *"shall have the right to sue* on such payment bond for the amount . . . unpaid at the time of institution of such suit *and to prosecute said action to final execution and judgment* for the sum or sums justly due him. . . ." (Emphasis supplied.) Government contractors were restricted in the kinds of agreements into which they might validly enter to those conforming to the public policy declared in the Miller Act.

The Heard Act, which was the predecessor of the Miller Act, had also been intended to protect those whose labor or material had contributed to the prosecution of the work on Government contracts. Under the Heard Act the Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Thereafter other claimants could sue but had to join in a [fol. 218] single action. As we commented in *Texas Con-*

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lant, but merely that the agreements were "maliciously inserted" in the contracts by the appellant in that, by providing for arbitration *in New York City*, the appellant sought to make it inconvenient and expensive for the appellee, a Georgia corporation, to get paid under the contracts. This is hardly a sufficient allegation of fraud in the inducement of the arbitration agreements to prevent arbitration in accordance with the agreements.

struction Company v. *United States*, 5 Cir., 1956, 236 F. 2d 138, 143, "it thus became essential that the place of such action be considered as a strict condition of the bringing of the suit since the right of all creditors might be completely cut off unless those conditions were strictly complied with." If the Heard Act were still in force no one could seriously urge the validity of the present agreement which provides: "Any controversy or claim arising out of or relating to this agreement or the breach thereof . . . shall be settled by arbitration in the Borough of Manhattan, City and State of New York in accordance with the Civil Practice Act of the State of New York."

The majority quotes from *Texas Construction Company* v. *United States*, *supra*, the following passage: ". . . the requirement as to the district in which suit may be filed, contained in the Miller Act, is only one for the benefit of the defendants and may thus be waived by them, as may any other question of venue."

In the *Texas Construction Company* case that language was employed in connection with the holding that a prime contractor and his bonding company when sued in a district other than that in which the contract was to be performed and executed may waive objection to the place of suit. In that context, the language employed does not mean that the requirement of the Miller Act that suit be brought "in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere" was intended for the benefit of the defendants *to the exclusion of the plaintiffs;* it means no more [fol. 219] than that the requirement relates to venue rather than jurisdiction and may be waived by *both parties.*

There is nothing in the language of the Act, or in its legislative history, which would restrict to the defendants the benefit of that requirement. The propriety of extending its protection to the plaintiffs is shown by the observation of the district court:

> "The instant case strikingly demonstrates the purpose of Congress in thus providing an exclusive venue, and, it is believed, an exclusive forum for the resolution of Miller Act disputes. The inherent inconvenience

and injustice of Moseley's being forced to transport himself, his records, and his witnesses from the scene of the activities under investigation to a point so distant as New York City is from Macon, Georgia, is readily apparent."

The prime contractor is in peculiarly favorable position to impose upon those who would enter into subcontracts with him burdensome agreements as to arbitration. The number of subcontractors from which the prime contractor may choose is limited only by the scope of the industry, while would-be subcontractors must seek the nod of a single prime contractor, who is in that respect a complete monopolist.

If, as must be conceded, the Heard Act protected those persons supplying the contractor with labor and materials against the imposition of such burdensome agreements, then, a fortiori, the Miller Act does no less. In *MacEvoy* [fol. 220] *Co.* v. *United States,* 1944, 322 U. S. 102, 105, 106, the Supreme Court said:

> "The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on its beneficiaries. There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond."

United States v. *Aetna Casualty & Surety Co.,* 2d Cir., 1962, 297 F. 2d 665, at page 667 points out:

> "Every subcontractor and materialman not reimbursed for work done under a contract, is given *an unqualified right to sue on the payment bond.*" (Emphasis supplied.)

In discussing the changes made between the Heard Act and the Miller Act, the court said, page 668-669:

"The primary aim of the Miller Act was to secure greater protection for the subcontractor. The major changes were designed to streamline the cumbersome Heard Act machinery and to facilitate suit by those supplying labor or materials to the general contractor. . . .

". . . The purpose of the Miller Act was clearly to [fol. 221] provide a forum for all unpaid subcontractors." (Emphasis supplied.)

The court found such a strong public policy in favor of the protection of subcontractors and the furnishing of a forum in which they may proceed in court to enforce their right to prompt payment that it rightly concluded that, although the work was done outside the United States and therefore was not within any judicial district, an unpaid subcontractor was nevertheless entitled to maintain his suit.

In this connection, the language which the court used on page 669 is most appropriate to the situation the plaintiff in this case would face if he were not permitted to prosecute his suit, when the court said:

". . . with no forum for enforcement, the bond becomes an empty gesture, a stately farce carried out by contractors and sureties, at the public expense, and to the detriment of the very class the Miller Act was designed to protect. We cannot accept a construction which would lead to such a result."

The Miller Act provides to every person who has furnished labor or material not only the right to sue in the district in which the contract was to be performed and executed but also the "right . . . to prosecute *said* action to final execution and judgment." (Emphasis supplied.) That is diametrically opposite to being required to stay the action to await the result of an arbitration.

The holding of the majority in the present case places it [fol. 222] within the power of prime contractors to insist on agreements for arbitration which might well nigh nullify the beneficent provisions of the Miller Act. That is not con-

ducive to the efficient, economical and just performance of Government contracts. So thinking, I respectfully dissent.

[fol. 223]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19351

D. C. Docket No. 1731 Civil

ELECTRONIC & MISSILE FACILITIES, INC. (formerly Five Boro Construction Corporation) and CONTINENTAL CASUALTY COMPANY, Appellants,

versus

UNITED STATES OF AMERICA for the use of H. W. MOSELEY d/b/a MOSELEY PLUMBING AND HEATING COMPANY, Appellee.

Appeal from the United States District Court for the Middle District of Georgia

Before Tuttle, Chief Judge, and Rives and Jones, Circuit Judges.

JUDGMENT—July 11, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, re-

versed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the views expressed in the opinion of this Court;

It is further ordered and adjudged that the appellee, United States of America for the use of H. W. Moseley d/b/a Moseley Plumbing and Heating Company, be condemned to pay the costs in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissenting."

[fol. 228] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 229]

SUPREME COURT OF THE UNITED STATES

No. 401, October Term, 1962

UNITED STATES for the use of H. W. MOSELEY, d/b/a MOSELEY PLUMBING AND HEATING COMPANY, Petitioner,

vs.

ELECTRONIC & MISSILE FACILITIES, INC., et al.

ORDER ALLOWING CERTIORARI—December 3, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 401

UNITED STATES OF AMERICA for the Use of H. W. Moseley, d/b/a MOSELEY PLUMBING AND HEATING COMPANY,
Petitioner,
versus
ELECTRONIC & MISSILE FACILITIES, INC. (Formerly Five Boro Construction Corporation), and CONTINENTAL CASUALTY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

UNITED STATES OF AMERICA for the Use of H. W. Moseley, d/b/a MOSELEY PLUMBING AND HEATING COMPANY,
Petitioner,

versus

ELECTRONIC & MISSILE FACILITIES, INC. (Formerly Five Boro Construction Corporation), and CONTINENTAL CASUALTY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioner, United States of America for the Use of H. W. Moseley, d/b/a Moseley Plumbing and Heating Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 11, 1962.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit with the dissenting opinion of Judge Rives has not yet been reported in the Federal Reporter, but appears

in the transcript of the record at pages 208-222. A copy of said opinions is appended to this petition at page 37.

The opinion of the District Court is contained in the record, pages 196-201.

JURISDICTION.

The opinion of the Court of Appeals for the Fifth Circuit was filed on July 11, 1962, and judgment was entered on the same date. There has been no motion for or order respecting a rehearing and no other proceedings have been had except the entry of an order, pursuant to motion by petitioner, staying the mandate of the Court of Appeals for the Fifth Circuit for a period of sixty days from July 26, 1962. The jurisdiction of this court in invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) The primary question presented by this petition is whether, in a suit under the Miller Act (40 U. S. C. 270 b) against a prime contractor and its surety by an unpaid subcontractor, the prime contractor and surety are entitled to a stay of such Miller Act suit to have the claim of the subcontractor determined by arbitration under provisions of the subcontract, or whether, on the other hand, such unpaid subcontractor is entitled to prosecute said action to final execution and judgment.

Respondent, Electronic & Missile Facilities, Inc. (formerly Five Boro Construction Corporation) was the prime contractor and respondent Continental Casualty Company was its surety, in contracts with the United States of America for the construction of Nike-Hercules facilities, one contract being for construction of such facilities at Robins Air Force Base Defense Area, Georgia and the

other for facilities at Turner Air Force Base Defense Area, Georgia, both of which Air Bases are located within the Middle District of Georgia. The use petitioner, H. W. Moseley, d/b/a Moseley Plumbing and Heating Company, entered into written subcontracts with the prime contractor under which Moseley was to do the plumbing and heating work in the construction of each of said facilities. After the work had been completed Moseley filed this suit in the District Court for the Middle District of Georgia under the Miller Act seeking to recover various sums to which he contended he was entitled and which were unpaid. The suit sought an injunction against the prime contractor's proceeding with an arbitration proceeding which had been commenced by it against Moseley in the City of New York under the purported authority of provisions of the subcontract. That defendant was temporarily restrained from proceeding with the purported arbitration. The defendants filed a motion to dismiss, or in lieu thereof to stay, the suit until an arbitration should be had in accordance with the provisions of the contracts. The District Court after a hearing determined the question adversely to the defendants, respondents herein, holding that the provisions of the United States Arbitration Act cannot be invoked in a Miller Act case so as to stay the proceedings in such case and compel unwilling arbitration, and accordingly denied the alternative motions to dismiss and to stay the proceeding and continued the temporary restraining order in force. On appeal the United States Court of Appeals for the Fifth Circuit in a two to one decision, reversed the judgment of the District Court and held, with one Judge dissenting, that the provisions of the contract with reference to arbitration were valid and enforceable and the defendants were entitled to a stay of the Miller Act suit until arbitration had been had. The question thus presented is whether, as held by the majority of the Court of Appeals for the Fifth Circuit, an

unpaid subcontractor, in spite of the explicit provision of the Miller Act that he "shall have the right to sue . . . and to prosecute said action to final execution and judgment for the sum or sums justly due him," must nevertheless have his suit stayed and submit his claim instead to arbitrators for determination where he has signed a subcontract purporting to so provide, or whether, on the other hand, as held by the District Court and the dissenting opinion of the Court of Appeals, the provisions of the United States Arbitration Act for compelling arbitration are inapplicable to suits under the Miller Act, adopted ten years after the Arbitration Act, for the reason that the explicit provision that persons occupying the position of an unpaid subcontractor "shall have the right to sue . . . and to prosecute said action to final execution and judgment" render unenforceable a provision inserted in a subcontract by a prime contractor purporting to take away those rights so explicitly stated by Congress.

(2) The second question presented is whether the subcontracts between Moseley and the prime contractor for the plumbing and heating work at these Nike-Hercules facilities were contracts "evidencing a transaction involving commerce"; within the meaning of the United States Arbitration Act. This question would be reached only in the event the primary question above stated should be decided adversely to petitioner's contention. The District Judge found it unnecessary to determine this question, stating "assuming but not deciding that the subcontract here sued upon comes within the ambit of Sec. 2 of the Arbitration Act" (R. 197), while the Court of Appeals for the Fifth Circuit held the Arbitration Act was applicable to these contracts (R. 210).

STATUTES INVOLVED.

The questions presented involve Secs. 1, 2 and 3 of the United States Arbitration Act and Sec. 2 of the Miller Act.

The Sections of the United States Arbitration Act here involved are set out in 9 U. S. C. 1, 2 and 3. Because of their length they are set out in full in the Appendix to this petition.

Sec. 2 of the Miller Act is set out in Act August 24, 1935, c. 642, Sec. 2, 49 Stat. 794, as amended by Act August 4, 1959, pub. L. 86-135, Sec. 1, 73 Stat. 279, and is now set out in 40 U. S. C. 270b as follows:

> "(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: **Provided, however,** That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made.

stating with a substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere; irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit."

STATEMENT OF CASE.

The facts as to the primary question are not in dispute because this question was decided by the District Court and the Court of Appeals for the Fifth Circuit and will be decided by this Court upon the basis of the facts alleged in the complaint and the law applicable thereto.

Suit was brought by petitioner under the provisions of the Miller Act to recover sums due and unpaid to him as a subcontractor who had furnished labor and material in the prosecution of the work provided for in the contract between the defendant contractor and the United States

of America. The complaint was brought in six counts. Counts I and II seek recovery directly on the contracts, count I relating to the contract for the work at Robins Air Force Base Defense Area near Warner Robins, Georgia, and count II relating to the contract for work at Turner Air Force Base Defense Area, near Albany, Georgia. The complaint attached copies of the subcontracts, which were on printed forms with blanks filled in by typewriter as to the name and address of the subcontractor, identification of the prime contract, the contract amount and the description of the work covered by the subcontract. The printed subcontract forms covered 13 pages, and thus were in fine print as compared to their appearance in the record, where the subcontract covering the work at Turner Air Force Base Defense Area covers 44 pages, being set out at pages 23-66. The contract for the work at Warner Robins Air Force Base Defense Area is identical except for description of the work and the contract amount, and is set out in the record, pages 67-110. Count I alleged the defendant was indebted to the plaintiff in the sum of $71,900.57 on the Warner Robins Air Force Base Defense Area contract, and count II alleged an indebtedness of $44,970.10 on the Turner Air Force Defense Area contract. It was alleged that paragraph 26 of the subcontract purports to provide that any controversy or claim arising out of said contract shall be determined by arbitration, but it was alleged that said provision for arbitration is void and unenforceable because (a) it is contrary to public policy in that it is in direct violation of the express provisions of the Miller Act. (b) it is an attempt to oust the Federal District Court of jurisdiction and to deprive petitioner of benefits intended by the Miller Act. . . . (c) it is unreasonable and arbitrary and its enforcement would work a hardship upon petitioner to the extent of depriving him of the rights intended to be granted by the Miller Act in that it would require presentation of evidence before a foreign

forum many hundreds of miles removed from the place where the work was performed and where petitioner's witnesses would be available and petitioner would not be able to compel the presence of witnesses at such distant place, as more fully set out in the record, pages 6-7. It was alleged that in spite of the invalidity of said arbitration provision the defendant contractor had filed in the Supreme Court of the State of New York, County of New York, a purported arbitration proceeding, had procured an order setting a hearing for February 28, 1961, and had purported to serve the same upon petitioner by mail, and unless temporarily restrained and enjoined said defendant would proceed with said purported arbitration to the irreparable injury and damage of petitioner (R. 7).

It was further alleged (R. 7) that petitioner could not adequately present the facts relating to his claim against defendants in said arbitration proceedings because compulsory process to require the presence of witnesses from the Middle District of Georgia in the Supreme Court of the State of New York, more than 700 miles from the Middle District of Georgia, would not be available.

It was further alleged (R. 8) that the Miller Act requires that a suit be commenced within one year after the last labor was performed or material was supplied and all of petitioner's rights under said act would be lost if he participated in arbitration proceedings and the same were not concluded within one year from the date when the last work was performed or material supplied by petitioner. Each of these counts prayed that the defendant contractor be temporarily and permanently enjoined from proceeding with the purported arbitration in New York.

Count III, with respect to the Warner Robins Air Force Base Defense Area contract, and count IV, with respect to the Turner Air Force Base Defense Area contract, seek to rescind the contracts because of fraud on the part of

the defendant prime contractor and to recover in quantum meruit $95,678.79 and $96,335.88, respectively, as well as $20,000.00 on each count as attorneys' fees and other expenses of litigation to which petitioner claims to be entitled because of the bad faith, misconduct, fraud, malice and oppression on the part of the defendant prime contractor alleged in those counts. These counts adopted all of the pertinent allegations of the previous counts with respect to the pendency of the purported arbitration proceedings in New York, the contentions of petitioner as to the invalidity of the provisions of the contract relating to arbitration, the inability of petitioner to adequately present the facts relating to his claim in such arbitration proceedings, and the necessity for said proceedings to be enjoined, and likewise prayed for a temporary and permanent injunction against the defendant contractor's proceeding with such arbitration.

The fraud which petitioner claimed entitled him to rescind the contract was that the defendant prime contractor "has been guilty of the grossest kind of misconduct, fraud, malice and oppression in its entire dealings with Moseley Plumbing and Heating Company in connection with said work and said contract in that it conceived and executed a fraudulent and illegal scheme, plan and design to perpetrate a fraud upon Moseley Plumbing and Heating Company, and other subcontractors as well, by causing said Moseley, as well as other subcontractors, to furnish materials and labor for said project with the intention on the part of said defendant of obtaining a large portion of said work and materials without paying therefor or by browbeating Moseley and said other subcontractors into accepting much less than their real value, which said plan, scheme and design was conceived, executed and perpetuated upon Moseley in the following particulars: . . ." (R. 12).

Then follow the particulars as to how said fraudulent scheme was carried into effect, set out in the various subparagraphs (R. 12-16) which may be summarized as follows:

(a) The defendant represented it was a general contractor and that the work to be done by Moseley was that spelled out in the typewritten part of the printed subcontract, whereas in truth that defendant had no intention of performing the proper function of a general contractor by doing substantial parts of the work itself and supervising and coordinating the work of subcontractors but instead intended to and did subcontract substantially all of the work and itself had no employees except for a project superintendent and a handful of laborers.

(b) Pursuant to that plan of operation said defendant fraudulently and with malice inserted into its printed subcontract form provisions purporting to authorize it to require Moseley or other subcontractors to do any work whatever, regardless of whether it bore any proper relation to the work called for in the main typewritten portion of the subcontract, which provisions were inserted with the specific malicious intent of using them to give color to and to act as a specious cover for directives to do work in no way connected with the plumbing and heating called for by Moseley's subcontract and with the intention of avoiding payment under the false and fraudulent contention that the work was covered by such subcontract, and if it could not get Moseley to accept the work as part of the subcontract to get him to accept a greatly reduced amount of compensation in order to avoid litigation and to obtain money with which to pay his creditors.

(c) Said defendant did issue numerous directives to Moseley to do work which the defendant knew was not covered by the contract but defendant in bad faith and maliciously as a part of said scheme contended it was so

covered, and defendant's bad faith in this connection was so great that it discharged from its employ its project superintendent who attempted to be honest and agreed with Moseley and other subcontractors that work called for by such directives was not covered by the subcontract and that he should receive additional compensation therefor.

(d) As a part of said scheme the defendant issued a large number of such directives so as to greatly increase the amount of work to be done by Moseley and increase his capital outlay and, at the same time, withheld payments to which Moseley was entitled, with the express purpose and intent of producing financial pressure upon Moseley with the intention of forcing him to settle with them for a price far below the real value of such additional work.

(e) This scheme of producing financial pressure on Moseley was a general scheme which said defendant applied to all subcontractors in order to squeeze profits for itself from the financial sacrifices it was attempting to cause said subcontractors to make, which plan was carried to complete fruition both with respect to Moseley and every other subcontractor, practically all, if not all of the subcontractors becoming insolvent by the time the project was completed.

(f) As a further part of said scheme said defendant carried out a practice of making back charges against each of the subcontractors and Moseley by which it billed them for enormous and outrageous charges for work allegedly covered by the subcontract and allegedly done by said defendant, when the defendant in truth knew that the work for which the back charges were made was not a part of the subcontract and the charges were maliciously made in an effort to reduce the compensation to which Moseley was entitled, and, for various work not

covered by any subcontract but plainly required to be done by said prime contractor, that defendant allegedly prorated the cost between each of the subcontractors but in fact actually charged the total cost of such work to each of such subcontractors, and in addition the defendant attempted to charge Moseley the cost of work performed by other subcontractors clearly covered by their subcontracts and not covered by Moseley's subcontract.

(g) The provisions of the subcontract purporting to require arbitration of any claim or dispute in New York were maliciously inserted in furtherance of the express purpose of the defendant to obtain work and materials without paying therefor and with the intention on the part of the defendant of causing a purported arbitration in New York, at least 700 miles from the Middle District of Georgia, where it knew and intended that Moseley and other subcontractors could not properly appear and present their evidence and claims because of the impossibility of compelling the attendance of witnesses at such great distance and because of being financially unable to do so because of the financial stress intentionally produced by the defendant, all with the intention of having allowed in favor of the defendant in such arbitration proceeding all of the false and fraudulent claims of defendant that Moseley was not entitled to compensation for extra work done under directives from that defendant and of having allowed their false and fraudulent back charges and with the intention of defeating the right of Moseley and other subcontractors to have their legitimate claims litigated in the United States Court for the Middle District of Georgia as expressly provided by the terms of the Miller Act.

Counts V and VI sought recovery for work done under the contracts at Warner Robins Air Force Base Defense Area and Turner Air Force Base Defense Area respectively under the alternative theory that, even if petitioner

could not show full performance of all terms of the subcontract so as to be entitled to recovery on the contracts themselves under counts I and II, and even if petitioner should be unable to establish a right to rescind the contracts as sought in counts III and IV, petitioner was nevertheless entitled to recovery of the reasonable value of the labor and materials furnished by petitioner and retained by the defendant, less payments made by defendant and any legitimate damages which may have been suffered by the defendant. These counts adopted all of the same allegations as to the purported arbitration proceedings, the invalidity of the contract provisions with respect to arbitration, the inability of Moseley to properly present his claims in the arbitration proceedings, and the necessity of enjoining such proceedings.

Upon filing and presentation of the verified complaint a temporary restraining order was entered restraining the defendant prime contractor from further proceedings in connection with his application for arbitration in New York, and thereafter the restraining order was continued in effect by consent of all parties.

The defendant prime contractor filed its motion to dismiss, or in lieu thereof, to stay the proceedings until an arbitration should be had in New York in accordance with the terms of the subcontract. Upon the hearing of this motion there was introduced an affidavit of Nathan Cohen, Executive Vice President of the defendant prime contractor, to the effect that the Nike installations at the Warner Robins Air Force Base Defense Area and the Turner Air Force Base Defense Area are four of approximately seven hundred different bases for anti-aircraft defense tied together by a system called semi-automatic ground environment system (SAGE) with headquarters in Colorado, consisting of bases stretching across Canada, Texas towers at sea, radar stations and communication

centers along both seaboards of the United States and BOMARC and Nike stations scattered throughout the United States, that the Nike stations erected at Warner Robins Air Force Base Defense Area and Turner Air Force Base Defense Area are designed not only to protect the Strategic Air Command bomber bases at those locations but to intercept enemy planes coming from abroad heading towards other installations in the United States, and that they are an integral part of an intercontinental defense system and were constructed to enlarge the existing facilities for such systems.

There was introduced also the deposition of Major John W. Poston, a witness for the petitioner, who was operations officer of an artillery missile battalion charged with the operation of the facilities constructed at the Warner Robins Air Force Base Defense Area. His testimony showed that the areas where these facilities were constructed were previously open land and forest with no improvements whatever, located about 15 to 17 miles from Warner Robins Air Force Base Defense Area and Turner Air Force Base Defense Area, respectively, that there were at these locations after completion of construction no facilities for operation of aircraft, but the primary purpose and functions of the installations was to launch missiles that would intercept enemy planes to defend the country in the event of hostile attack.

It was clear from Major Poston's testimony that even after full completion of the construction contract by the prime contractor the facilities had not, and could not, become a part of the defense system detailed in his testimony and in the affidavit of Cohen, but that it was necessary for the Army then to install a tremendous amount of equipment, such as cabling systems, computers, launchers, radar controls, antennas, and assembling equipment, and it had to bring in missile components and build them into

missiles and place them on the launchers which the Army had installed, develop security systems, set up systems for housing, feeding and administering troops, move in troops and then tie the facilities in by communications to other parts of the defense system (R. 146-147). He testified (R. 171-172) that after full completion of the contract by the prime contractor, it was necessary for the Army to do $200,000.00 worth of labor and install $7,000,000.00 worth of equipment at each of two different locations at Warner Robins Air Force Base Defense Area and two locations at Turner Air Force Base Defense Area. Thus the total labor left to be done by the Army was some $800,000.00 worth, and the total cost of equipment which had to be installed was approximately $28,000,000.00, all of which was necessary in order for the facilities, after completion of the prime contractor's construction, to become a part of the defense system.

The only evidence related to the nature of the construction. The primary question as to the enforceability of the arbitration provisions of the contract, and the right of the defendant prime contractor to a stay of the Miller Act suit was determined as a question of law on the basis of the allegations in the complaint.

It is significant that the provisions of the subcontract with respect to arbitration do not require that there be any dispute between the parties. It purports to provide even that any **claim** under the contract shall be submitted to arbitration. That provision is: "Arbitration: Twenty-Sixth: (a) Any controversy or claim arising out of or relating to this agreement or the breach thereof, provision for the determination of which is not made elsewhere in this agreement, shall be settled by arbitration in the Borough of Manhattan, City and State of New York in accordance with the Civil Practice Act of the State of New York. The Contractor and the Subcontractor agree

that any application by either side for the appointment of an arbitrator in accordance with this paragraph shall be made in the Supreme Court of the State of New York, County of New York, and that said Court shall have jurisdiction over every party in connection with any such arbitration. The cost of such arbitration shall be borne equally".

Although the majority opinion of the Court of Appeals for the Fifth Circuit contains the statement (R. 213): "The appellee has not even attempted to demonstrate how or why he would be prejudiced by having this dispute settled by arbitration rather than in the federal courts"; the case was decided both in the District Court and in the Court of Appeals on the basis of the allegations of the complaint, and thus there is absolutely no dispute in the record of the allegation in paragraph 15 of count I (R. 7), which is adopted in each of the other counts, that "petitioner could not adequately present the facts relating to his claim against defendants in said arbitration proceedings because compulsory process to require the presence of witnesses from the Middle District of Georgia in the Supreme Court of the State of New York, more than 700 miles from the Middle District of Georgia would not be available". Likewise there is in the record no dispute with respect to the allegations of subparagraph (g) of paragraph 2 of count III (R. 16), adopted in counts IV, V and VI, that: "The provisions in said subcontract purporting to require an arbitration of any claim or dispute in the State of New York was maliciously inserted in said contract in furtherance of the express purpose of defendant to obtain work and materials without paying therefor with the intention on the part of said defendant of causing a purported arbitration of all such claims in the State of New York at least 700 miles distant from the Middle District of Georgia where it knew and intended that Moseley and other subcontractors could not properly appear and

present their evidence and claims because of the impossibility of compelling the attendance of witnesses at so great distance and because of being unable financially to do so because of the financial stress intentionally produced by defendant, all with the intention of having allowed in favor of said defendant in such proceeding all of the false and fraudulent claims of defendant that extra work done by Moseley and other subcontractors was covered by their subcontracts when in fact it was not, and of having allowed their false and fraudulent back charges against Moseley and other such subcontractors as hereinbefore alleged, all with the intention of defeating the right of Moseley and other subcontractors to have its legitimate claims litigated in this Honorable Court as expressly provided by the terms of the Miller Act."

The basis for Federal jurisdiction in the court of first instance is the provision of the Miller Act, set out in 40 U. S. C. 270b (b) that

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit. . . ."

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been, but should be, settled by this court.

The Miller Act applies to every contract exceeding $2,000.00 in amount for the construction, alteration, or repair of any public building or public work of the United States. (40 U. S. C. 270 a). There are thousands

of such contracts executed every year and literally billions of dollars of public funds are spent each year for such construction. In every large construction contract the prime contractor enters into subcontracts with many smaller contractors, and in turn each of these smaller subcontractors purchases materials from a large number of material men and has other subcontracts of his own as well as numerous persons engaged by him to furnish labor. Thus for each prime contract there are hundreds and often thousands of persons furnishing labor or material and who are thus within the class for whose benefit and protection payment bonds are required under the Miller Act.

Local subcontractors and material men, with the assurance given by the Miller Act, that, if they are not paid for labor and materials they have furnished, they have a right to sue on the bond of the prime contractor and "to prosecute said action to final execution and judgment", and that the suit "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere", have definite assurance that they will be paid for the labor and material which they furnish, and that if they are not paid voluntarily by the contractor or subcontractor by whom employed they have a right to sue a surety which they know is solvent and from whom their legitimate bills may be collected, and that such suit, regardless of amount, may be prosecuted in the United States District Court in the district where the work was done or materials were furnished.

This wise provision of the Miller Act enables the public work to go forward speedily. There is no reluctance on the part of laborers, material men and subcontractors to furnish labor and material to a prime contractor in carrying out a contract with the United States.

On the other hand, if these small local laborers, material men and subcontractors did not have such assurance, they would be reluctant to furnish this labor and material for the public work to a large prime contractor unknown to them.

The number of subcontractors and material men willing to contract with a prime contractor without this protection would be greatly reduced, and the cost at which the prime contractor could do the work would therefore be increased, thus causing his bid, and the cost to the public, to be correspondingly increased.

The lack of such protection would enable unscrupulous prime contractors to cheat and swindle local subcontractors out of amounts justly earned by them, by the insertion in the fine print of voluminous subcontracts of burdensome agreements by which they could defeat payment altogether or reduce their payments to a small fraction of what they legitimately owe by making it so difficult and expensive for the local subcontractor to obtain payment that he will settle his claim for a small fraction of its real value. **That is exactly what has happened in this case**, according to the allegations of the complaint.

This very grave consideration was pointed out by dissenting Judge Rives when he said (R. 219): "The prime contractor is in peculiarly favorable position to impose upon those who would enter into subcontracts with him burdensome agreements as to arbitration. The number of subcontractors from which the prime contractor may choose is limited only by the scope of the industry, while would-be subcontractors must seek the nod of a single prime contractor, who is in that respect a complete monopolist."

On the same page of the record, the dissenting Judge quotes language of the District Judge that: "The instant

case strikingly demonstrates the purpose of Congress in thus providing an exclusive venue, and, it is believed, an exclusive forum for the resolution of Miller Act disputes. The inherent inconvenience and injustice of Moseley's being forced to transport himself, his records, and his witnesses from the scene of the activities under investigation to a point so distant as New York City is from Macon, Georgia, is readily apparent."

This Court itself pointed out in **MacEvoy Co. v. United States**, hereinafter cited, that the changes made by the Miller Act in the Heard Act which it repealed and superseded were made for the purpose of making it easier for unpaid creditors to realize the benefits of the bond and that one of the purposes of the Miller Act was to avoid inconveniences and delays and to avoid the necessity for unpaid laborers, subcontractors and material men to settle meritorious claims for less than the full amount.

The primary question as to whether a suit by an unpaid material man or subcontractor under the Miller Act may be stayed to await the outcome of enforced unwilling arbitration in accordance with the terms of a subcontract purporting to require the same is one of first impression.

Although there are three other cases, two from the Fourth Circuit, and one from the Sixth Circuit, indicating or holding that arbitration is allowable in a Miller Act suit, the contention here urged was not presented to or considered by the court in either of those cases. This fact was pointed out by the District Judge (R. 200), was recognized by counsel for respondents in their arguments before the Court of Appeals for the Fifth Circuit, and is pointed out by the majority opinion of the Court of Appeals for the Fifth Circuit (R. 215).

The first of these cases, **Agostini Bros. Building Corporation v. United States**, 4 Cir., 142 Fed. 2d 854, without

considering or deciding the question here presented, was decided upon the basis that the United States Arbitration Act was applicable to all contracts containing an agreement to arbitrate, and not just those dealt with in Section 2 of the Act, namely, maritime transactions and contracts evidencing a transaction involving commerce. This view of that court was the basis for the decision authorizing a stay for arbitration. Since that decision in 1944, this view, and the entire basis for that decision, has been rejected by this Court in a decision holding directly to the contrary. In **Bernhardt v. Polygraphic Co.**, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, this Court specifically held that the stay authorized by Section 3 was applicable only to agreements for arbitration contained in the kinds of contracts specified in Section 2, namely, maritime transactions and contracts evidencing transactions involving commerce.

The next case, **United States v. Bregman Construction Corporation**, 6 Cir., 256 Fed. 2d 851, did not grant a stay although the Court, at page 853, cited the Agostini Bros. case, supra, as authority for a statement that in a proper situation the Arbitration Act applies in proceedings brought under the Miller Act.

The other case, **United States v. Al Con Development Corporation**, 4 Cir., 271 Fed. 2d 904, was decided upon the basis of concession by the defendants that the provisions of the Arbitration Act "are not applicable here and that, if the lower court has the power to stay proceedings, pending arbitration, it must find that authority in the law of the State of Virginia" (p. 906). That court then proceeded to conclude that the agreement was enforceable under the state law because the agreement provided that the decision of the arbitrators "shall be a condition precedent to any right of legal action" (p. 906).

Thus the instant decision is the only one in which any court has considered the effect of the public policy embodied in the Miller Act upon private agreements between a prime contractor and a subcontractor that any claim or dispute shall be settled by arbitration at a place many hundreds of miles from the place where the work was performed, in spite of the specific language of the Miller Act that any person who has furnished labor or material and has not been paid "shall have the right to sue . . . and to prosecute said action to final execution and judgment . . . ."

The only case we have found in which any court has considered the validity and enforceability of contract provisions found to be at variance with the public policy declared by the Miller Act is a District Court decision in **United States v. Holloway Company**, 126 Fed. Sup. 347, where the court said (p. 348):

> "This court is of the opinion that the provisions in the contracts between the plaintiffs and the Holloway Company, to the effect no payment is to be due the subcontractor until final payment has been made by the Government to the prime contractor are contrary to the public policy to be gleaned by a reading of the Miller Act. Title 40, U. S. C. A., Section 270a et seq. A study of this Act reveals Congress had in mind providing an efficient and speedy method whereby those supplying labor and materials to a person having a contract with the Government of the United States for the erection of public improvements could in the event of proper performance of the contract on their part recover by an action on a payment bond to be furnished by the prime contractor and a corporate surety, the amounts due and owing said subcontractor at the completion of the latter's performance. Reasonable periods were inserted in the

Miller Act within which an action to recover under a statutory bond could be had: . . . . Any contractual deviations from the objectives of the Miller Act which cause or tend to cause unwarranted delay to good faith subcontractors are against the public policy of the Act and should not afford an escape to those prime contractors who have secured insertion of the above covenants in contracts between them and subcontractors."

2. **The decision of this important question of federal law by the Court of Appeals for the Fifth Circuit is in conflict with applicable decisions of this Court.**

(a) It is in conflict with **MacEvoy Company v. United States**, 1944, 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163, where, at pages 105-106 of 322 U. S., this Court held:

"The Heard Act, which was the predecessor of the Miller Act, required Government contractors to execute penal bonds for the benefit of 'all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract.' We consistently applied a liberal construction to that statute, noting that it was remedial in nature and that it clearly evidenced 'the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work' . . .

"**The Miller Act**, while it repealed the Heard Act, reinstated its basic provisions and **was designed primarily to eliminate certain procedural limitations on its beneficiaries.** There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; **the intent rather was to remove the procedural difficulties** found to exist under the earlier measure and thereby **make it easier for unpaid creditors to realize the benefits of the bond.**" (Emphasis supplied.)

The Court, in a footnote, pages 105-106, says:

> "Under the Heard Act, a single bond was required to protect both the Government and the suppliers of labor and materials. The Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. **Serious inconveniences and delays resulted. The claimants, often in need of immediate funds, were compelled to settle meritorious claims for less than the full amount. The Miller Act was designed to meet these difficulties** by requiring that the prime contractor execute two bonds—a performance bond to protect the Government and a payment bond to protect the creditors. Creditors can sue on the latter bond without waiting for the Government and even without waiting for completion of the project. Each creditor may sue separately ninety days after the labor is completely performed or materials fully supplied." (Emphasis supplied.)

The majority opinion of the Court of Appeals for the Fifth Circuit permits a result diametrically opposed to the specific intent of Congress as declared by this Court.

It is alleged in this complaint that the defendant contractor conceived and executed a fraudulent and illegal scheme, plan and design to perpetrate a fraud upon Moseley "by causing said Moseley . . . to furnish materials and labor . . . with the intention on the part of said defendant of obtaining a large portion of said work and materials without paying therefor or by browbeating Moseley . . . into accepting much less than their real value . . ." (R. 12), and that one of the means by which said contractor carried this plan, scheme and design into effect was by the insertion in the printed subcon-

tract of the provisions purporting to require arbitration of any claim or dispute in New York (R. 16).

In other words, petitioner alleged that the prime contractor conceived a fraudulent scheme to accomplish precisely what this Court said in the above case that the changes which the Miller Act made in the Heard Act were intended by Congress to prevent.

Although that case did not deal with arbitration provision, the principle there enunciated requires a holding contrary to the majority opinion of the Court of Appeals for the Fifth Circuit.

(b) The Court of Appeals decision is in conflict with **United States v. Carter,** 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776, where this Court held:

> "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate **the Congressional intent to protect those whose labor and materials go into public projects** . . . (p. 216).
>
> "The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings. **The essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material** . . ." (pp. 216-217) (Emphasis supplied).

(c) The Court of Appeals holding that "the appellee will not be deprived of any substantial right if it is forced to comply with its voluntarily assumed obligation to arbitrate in New York City" (R. 211), is in direct conflict

with a decision of this Court pointing out the very substantial differences in the substantive rights of the parties which may result from proceeding by arbitration rather than in the United States District Court in the District in which the work was performed as the statute provides, where this Court said in **Bernhardt v. Polygraphic Company**, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (p. 203):

> "For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action . . .. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate results. Arbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment . . .. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in **Wilko v. Swan**, 346 U. S. 427, 435-438, 98 L. Ed. 168, 175-177, 74 S. Ct. 182."

(d) The decision of the Court of Appeals is likewise in conflict with the applicable decision of this Court in **Wilko v. Swan**, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168.

In the Wilko case the Court of Appeals for the Second Circuit had held in **Wilko v. Swan**, 201 Fed. 2d 439, at p. 444:

> "We think that the remedy a statute provides for violation of the statutory right it created may be sought not only in any 'court of competent jurisdiction' but also in any other competent tribunal such as arbitration . . ."

This Court on certiorari reversed that philosophy and held to the opposite that the remedy a statute provides for violation of the statutory right it created is part and parcel of the right itself and the remedy may not be waived and an agreement to arbitrate substituted for it. This Court therefore held void an agreement to arbitrate any controversy which was contained in a margin agreement for the purchase of securities. This Court pointed out that the provisions of the Securities Act of 1933 were designed to protect investors, and require dealers, etc., to make full and fair disclosure of the character of securities sold and to prevent fraud in their sale, and then said, 346 U. S., p. 431:

> "To effectuate this policy, Sec. 12 (2) created a special right to recover for misrepresentation which differs substantially from the common law action . . ."

The Court then adopts the argument of the petitioner that "the purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act", and "that arbitration lacks the certainty of a suit at law under the Act to enforce his rights."

The Court says (p. 435) "and we think the right to select the judicial forum is the kind of 'provision' that cannot be waived under Sec. 14 of the Securities Act. That conclusion is reached for the reasons set out above in the statement of petitioner's contentions on this review . . .

"When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary."

The language of this Court in that case is even more applicable to the Miller Act. The Miller Act gives an unpaid subcontractor an absolute right, not only to sue, but to "prosecute said action to final execution and judgment." Instead of a wide choice of the forum in which to bring such suit, it is specifically provided in the Miller Act that "every suit instituted under this section **shall be brought** . . . in the United States District Court for any District in which the contract was to be performed and executed **and not elsewhere** . . ."

Rather than surrendering one of the advantages which the Act gives him, as was said by this Court of the security buyer in the Wilko case, a subcontractor purporting to agree to settle any claim by arbitration surrenders **every** right which the Miller Act gives him, and completely nullifies its intended benefits.

(c) The decision of the Court of Appeals is in conflict with the applicable decision of this Court in **Brooklyn Savings Bank v. O'Neil**, 324 U. S. 697, 65 S. Ct. 895, 89 L. Ed. 1296.

In that case this Court held void an agreement by an employee to release the employer from liability for liquidated damages for failure to pay the minimum wages provided by the Fair Labor Standards Act, rejecting a contention that Congress did not intend for such waiver of rights to be void because it had in other acts specifically provided that waiver of rights there granted would be void, but had not so provided in this Act. In that connection this Court said (p. 713): "absence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative policy would be thwarted by permitting such contracts. The decision in the instant case is based on the legislative policy behind this enactment. . . ."

The rule, supported by numerous decisions cited by this Court, which was applied by this Court to the Fair Labor Standards Act is just as applicable to the Miller Act, where the court said: "It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy . . . Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate" (p. 704).

That decision is clearly appl able to the provisions of the Miller Act giving an unpaid subcontractor the right to sue and to prosecute the action to final execution and judgment, because it was clearly held by this Court in **MacEvoy v. United States**, supra, that the Miller Act clearly evidenced the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work and that by the changes from the Heard Act which were made by the Miller Act the intent of Congress was to remove the procedural difficulties found to exist under the earlier measure and thereby **make it easier for unpaid creditors to realize the benefits of the bond.**" (Emphasis supplied.)

(f) The decision of the Court of Appeals is also in conflict with the applicable decision of this court in **Boyd v. Grand Trunk Western Railroad Co.**, 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55, which held void an agreement by an injured railroad employee that any suit he brought would be brought in the state where he lived and was injured, where this court said: "The right to select the forum granted in Sec. 6 is a substantial right. It would thwart the express purpose of the Federal Employer's Liability Act to sanction defeat of that right by the device of the bar."

(g) The Court of Appeals decision is likewise in conflict with the applicable decision of this Court in **Pope v. Atlantic Coastline Railroad Company**, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094, which reversed a decision of the Supreme Court of Georgia to the effect that a Court of Equity in that state could restrain a resident of the state from maintaining a suit in a court of a foreign state upon a cause of action arising in Georgia under the Federal Employer's Liability Act, where the foreign suit had for its purpose or necessary effect the obtaining of an inequitable or unconscionable advantage over the defendant. This Court held the right of an injured employee to bring suit in one of the forums provided by the act could not be thus restricted, saying (p. 383): "Congress has deliberately chosen to give petitioner a transitory cause of action; and we have held before, . . . that Sec. 6 displaces the traditional power of a state court to enjoin its citizens on the ground of oppressiveness . . . from suing . . . in the state courts of another state."

All of the above decisions of this Court, firmly and clearly establishing the law to be that a right granted by an act of Congress to a particular class of beneficiaries cannot be waived, where the waiver of the right would thwart the purpose of Congress, are clearly applicable to the provisions of the Miller Act with respect to the right granted unpaid laborers, subcontractors and material men to sue and to prosecute such action to final execution and judgment.

It should be borne in mind that the Arbitration Act, with its provision for a stay of certain types of suits, was enacted in 1925 and had been in effect for ten years when the Miller Act was enacted in 1935 with its specific, unqualified provision that an unpaid subcontractor "shall have the right to sue . . . and to prosecute said action to final execution and judgment".

Thus it is inevitable that Congress, in enacting the Miller Act with these positive provisions, had in mind the provisions of the United States Arbitration Act which, except for the specific provisions of the Miller Act deliberately inserted by Congress, might have permitted a stay of such suits if the contract for the work evidenced a transaction involving commerce.

If Congress had not intended to prevent a stay of such suits, it would not have added the words "and to prosecute said action to final execution and judgment", but would have stopped with the words "shall have the right to sue".

The unqualified right "to prosecute said action to final execution and judgment" completely excludes the possibility of such action being stayed. To sue and to prosecute an action to final execution and judgment is the exact opposite of suing and not prosecuting, but having the suit stayed.

Black's Law Dictionary defines "prosecute" as follows:

> "To follow up; **to carry on** an action or other judicial proceeding; to proceed against a personal criminally. To 'prosecute' an action is **not merely to commence it, but includes following it to an ultimate conclusion** . . ." (Emphasis supplied).

The same authority defines the verb "stay" as follows:

> "To stop, arrest or forbear."

It defines the noun "stay" as follows:

> "A stopping; the act of arresting a judicial proceeding by the order of the court."

Obviously then, if an action is stayed, it is not being prosecuted, it is not being carried on, it is not being followed to an ultimate conclusion.

When Congress provided that an unpaid subcontractor shall have the right to use, and was not content to stop there but added the words "and to prosecute said action to final execution and judgment", the added words, if they do not clearly mean that such a suit shall not be stayed for arbitration or any other purpose, do not mean anything whatever. Surely it cannot be held that Congress added these words for no purpose and with no meaning.

The error of the majority opinion of the Court of Appeals lies in the fact that it stresses the venue provision of the Miller Act as to the District Court in which such suit shall be brought, and ignores altogether these words giving the unqualified right not only to sue but to prosecute the action to final execution and judgment.

3. **The decision in this case is in conflict with the decision of another Court of Appeals on the matter of the Congressional intention with respect to the Miller Act and the applicable principles governing its construction.**

It is in conflict with **United States v. Aetna Casualty & Surety Company**, 2d Cir., 297 Fed. 2d 665, where, in construing the Miller Act, that court said:

> "Every subcontractor and material man not reimbursed for work done under a contract is given an unqualified right to sue on the payment bond . . . (p. 667).
>
> "The primary aim of the Miller Act was **to secure greater protection for the subcontractor.** The major changes were designed to streamline the cumbersome Heard Act machinery and **to facilitate suit** by those supplying labor or materials to the general contractor. It would be ironic indeed to find in those amendments a provision which in today's world would scuttle a major part of the bonding scheme. For that would

be the result of accepting defendant's construction: **with no forum for enforcement, the bond becomes an empty gesture, a stately farce carried out by contractors and sureties, at the public expense, and to the detriment of the very class the Miller Act was designed to protect.** We cannot accept a construction which would lead to such a result. . . .

". . . **the purpose of the Miller Act was clearly to provide a forum for all unpaid subcontractors**" (pp. 668-669).

This clear and strong language of the Court of Appeals for the Second Circuit is in direct conflict with language of the majority opinion in the instant case where the majority said (R. 211):

"The venue provision of the Miller Act, requiring that suit be brought in the district where the contract was performed, was obviously not designed to favor Miller Act plaintiffs. Had Congress meant to make things easy for such plaintiffs, it would have provided them with a choice of forums in which to bring suit."

4. The decision of the Court of Appeals of the Fifth Circuit, in holding that the United States Arbitration Act is applicable to this subcontract, is in conflict with the applicable decision of this court in Murphy v. Reid, 335 U. S. 865, 69 S. Ct. 105, 33 L. Ed. 410, holding that claims under the Fair Labor Standards Act involving solely construction work should be dismissed.

Although this Court in **Mitchell v. C. W. Vollmer and Co.** 349 U. S. 427, 75 S. Ct. 860, 99 L. Ed. 1196 and **Mitchell v. Lublin, McGaughy and Associates,** 358 U. S. 207, 79 S. Ct. 260, 3 L. Ed. 2d 243, held the Fair Labor Standards Act applicable to construction which consists of repair of existing facilities already a part of commerce or an improvement to such facilities by adding other things to an

existing facility which will enable it to operate more effectively, this Court has not extended even that act to construction of the type here involved, entirely new construction, which even after it was fully completed, did not become a part of any existing facility already engaged in commerce, but merely provided the bare building construction which was turned over to the Army which itself then had to perform labor and furnish material at a value of $28,800,000.00 before these Nike-Hercules bases could become a part of an existing defense system.

Furthermore, the Fair Labor Standards Act is much broader in its definition of commerce than is the meaning of that word as used in the Arbitration Act. The Fair Labor Standards Act defines commerce as "trade, commerce, **transportation, transmission or communication** among the several states" (Emphasis supplied).

The Arbitration Act by Sec. 2 applies only to a maritime transaction or "a contract evidencing a **transaction involving commerce.**"

Therefore, under the Arbitration Act, it is not sufficient that the construction have an effect upon commerce, but the construction itself which the contract governs must be "a transaction involving commerce".

Thus, it would not have been sufficient even if the construction after it had been completed had become a part of a facility which was itself engaged in commerce, as would have been sufficient under the Fair Labor Standards Act. The particular transaction, the construction, must **involve commerce.**

CONCLUSION.

The subcontract in this case was not a contract evidencing a transaction involving commerce within the meaning of the Arbitration Act; and therefore that Act

has no application, and respondents were not entitled to a stay of the pending Miller Act suit.

Even, however, if the subcontract should be held to be a contract evidencing a transaction involving commerce, and the Arbitration Act would ordinarily be applicable, it does not apply to any suit brought under the provisions of the Miller Act because of the overriding public policy of that Act as shown by the explicit language that an unpaid subcontractor, laborer or material man "shall have the right to sue . . . and to prosecute said action to final execution and judgment."

The specific question as to whether the right thus explicitly granted by the Miller Act may be entirely nullified by a voluminous subcontract which has hidden within its many pages of fine print a provision purporting to require every claim thereunder to be settled by arbitration at a point many hundreds of miles distant from the place where the work was performed has not been, but should be settled by this court. It is a question of far-reaching importance affecting thousands of subcontractors every year who are owed billions of dollars by prime contractors. This court should decide whether such contractors, after being required by the Miller Act to give a bond for the benefit of unpaid subcontractors, laborers and material men, may entirely nullify the benefit of such bond which Congress intended persons in that class should have, by inserting in its printed subcontract which it requires all of the subcontractors to sign a provision destroying the right to sue on such bond and to prosecute the action to final execution and judgment and substituting arbitration at a distant point as the exclusive remedy provided by the contractor in lieu of the remedy specifically provided in mandatory terms by Congress. If that can be done, then the bond would indeed become an empty gesture and a stately farce.

We respectfully submit that the Court of Appeals for the Fifth Circuit has decided a most important question of Federal law which has not been settled by this court but should be settled and that the decision it has rendered is in conflict with applicable decisions of this court and of another Court of Appeals and that there are important and urgent reasons why this Court should grant this petition for certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX.

OPINION.

In the
United States Court of Appeals
For the Fifth Circuit

No. 19,351

Electronic & Missile Facilities, Inc.,
(formerly Five Boro Construction Corporation)
and Continental Casualty Company,
Appellants,
versus
United States of America for the use of
H. W. Moseley d/b/a Moseley Plumbing
and Heating Company,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(July 11, 1962.)

Before Tuttle, Chief Judge, and Rives and Jones, Circuit Judges.

Tuttle, Chief Judge: The appellant, Electronic & Missile Facilities, Inc., was prime contractor with the United States Government for the construction of Nike Hercules Facilities at Robins Air Force Base and Turner Air Force Base within the Middle District of Georgia. The appellee,

Moseley, was a subcontractor on both projects, and was primarily responsible for the plumbing, heating and air conditioning work. This suit was instituted in the District Court for the Middle District of Georgia by the United States in behalf of the appellee under the provisions of the Miller Act, 40 U. S. C. § 270 a-d. The complaint alleged that approximately $125,000 was due Moseley for work performed under the subcontracts, and that the appellant[1] had breached the subcontracts by refusing to pay. In the alternative, the complaint sought to rescind the contracts for fraud, and to recover for the work performed on a quantum meruit basis. The appellant moved to stay the action on the ground that both subcontracts expressly provided for arbitration of all disputes in New York City.[2] The District Court held that arbitration was contrary to the policy underlying the Miller Act, and the Court therefore enjoined the appellant from proceeding with arbitration in accordance with the provisions of the subcontracts. The appellant brought this appeal pursuant to 28 U. S. C. § 1292 (a) (1). We have concluded that the District Court erred in enjoining arbitration.

The United States Arbitration Act provides that an arbitration provision in any contract "evidencing a transaction involving commerce" shall be "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2. The Arbitration Act further provides that:

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[1] The other appellant, Continental Casualty Company, provided the bond for Electronic & Missile Facilities, Inc. The instant suit was brought on the bond as provided by the Miller Act. Electronic & Missile Facilities, Inc. will be referred to as "the appellant" in this opinion.

[2] The arbitration provisions related to "[a]ny controversy or claim arising out of or relating to this agreement or the breach thereof. . . ."

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing that the applicant for the stay is not in default in proceeding with such arbitration. 9 U. S. C., § 3.

It is clear, first of all, that since the construction of the missile facilities in Georgia required substantial interstate movement of materials and personnel,[3] the contracts here in issue come within the purview of the Arbitration Act as contracts "evidencing a transaction involving commerce." **Metro Industrial Painting Corp., et al. v. Terminal Construction Company, Inc.**, 2 Cir., 287 F. 2d 382. Nevertheless, the District Court held the Arbitration Act inapplicable to the instant case on the theory that a contrary holding would nullify the provisions of the Miller Act requiring

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[3] As the appellant states in its brief:

"Under the facts in the case at bar, appellants are engaged in commerce regardless of which test is applied. It is undisputed in the record that appellant, ELECTRONIC & MISSILE FACILITIES, INC., a New York corporation, contracted with appellee, a Georgia corporation, to do work within the state of Georgia; that appellant sent substantial supervisory personnel across state lines; and received supplies and equipment across state lines. Working on the project were subcontractors from states other than Georgia. Moreover, the facility involved is an integral part of a transcontinental system joined and holding hands with facilities already in commerce in other states and countries by radios and telephone communications, and further joined with numerous other military bases already in commerce from almost the North Pole to Puerto Rico in a single giant network of air bases and communication facilities."

the appellee to sue in the District Court for the Middle District of Georgia and giving him the right to prosecute the suit to final execution and judgment.[4]

We find this theory wholly unconvincing. The venue provision of the Miller Act, requiring that suit be brought in the District where the contract was performed, was obviously not designed to favor Miller Act plaintiffs. Had Congress meant to make things easy for such plaintiffs, it would have provided them with a choice of forums in which to bring suit. As this Court noted in **Texas Construction Company v. United States**, 5 Cir., 236 F. 2d 138, at page 143:

> "... the requirement as to the district in which suit may be filed, contained in the Miller Act, is only one for the benefit of the defendants and may thus be waived by them, as may any other question of venue."

It seems clear, therefore, that the appellee will not be deprived of any substantial right if it is forced to comply with its voluntarily assumed obligation to arbitrate in New York City.

The Federal Employers' Liability Act[5] cases relied on by the appellee and the District Court are plainly inapposite to the case at hand. Section 6 of that Act permits an

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[4] The Miller Act provides:

"Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit." As amended Aug. 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279, 40 U. S. C. § 270b (b).

[5] 45 U. S. C., § 51.

injured employee to select any of three forms in which to press his claim. This provision was clearly and unmistakably enacted for the benefit of Liability Act plaintiffs. By providing a choice of three forums for the often impecunious workingman, Congress sought to assure that he would not be dissuaded or prevented from obtaining relief by the necessity of having to litigate his claim in an inconvenient forum. Thus, in **Boyd v. Grand Trunk Western Railroad Company**, 338 U. S. 263, the Supreme Court invalidated a contract provision restricting the plaintiff's choice of forums on the ground that:

> "... petitioner's right to bring this suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the Liability Act: 'Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. ...'"
>
> ...
>
> "The right to select the forum granted in § 6 is a substantial right. It would thwart the express purpose of the Federal Employers' Liability Act to sanction defeat of that right by the device at bar." 338 U. S. at pages 265, 266.

The Miller Act does not give a plaintiff the "right to select" his forum. Rather, it provides that the action must be commenced in the district where the contract was performed. This provision, as noted above, is for the benefit of the defendant, not the plaintiff, and the plaintiff is therefore not deprived of any substantial right if he is compelled to carry out his contract to litigate partially outside the district where the contract was performed.

Even apart from the question of venue, the District Court held that the Miller Act precluded arbitration,

wherever conducted, because it would negate appellee's right under the Act to press his claim in a court of law, and to "prosecute the suit to final execution and judgment." This theory must be rejected for essentially two reasons. First, there is absolutely nothing in the language or legislative history of the Miller Act which indicates that Congress meant to prohibit a laborer or materialman from voluntarily substituting the procedure of arbitration for his right to litigate in a federal court. On the other hand, the United States Arbitration Act expressly and unequivocally gave the parties the right to provide for arbitration of all disputes arising under their contracts. The District Court's decision, in effect, repeals the Arbitration Act as applied to Miller Act suits even though there is not the slightest indication anywhere that Congress meant this to be so.

Secondly, the appellee has not even attempted to demonstrate how or why he would be prejudiced by having this dispute settled by arbitration rather than in the federal courts. If it could be shown that disputes arising under the Miller Act involve complicated and sophisticated legal issues which cannot readily be resolved by arbitrators untrained in the law, we would perhaps be more willing to read into the Miller Act provision giving the appellee the right to sue in the federal courts a prohibition against having the dispute settled anywhere else. But such is not the case. This dispute involves nothing more than the rights and liabilities of two business concerns under ordinary business contracts. It is precisely the type of commercial dispute which is, and has always been thought to be, a proper subject for arbitration.

Indeed, the case most strongly relied on by the appellee demonstrates the fallacy in its argument. That case is **Wilko v. Swan**, 346 U. S. 427, where the Supreme Court held that an arbitration agreement could not prevent a

defrauded purchaser of securities from suing the selling under the provisions of the Securities Act of 1933. The rationale of that decision can be gleaned from the following quotation from the Court's opinion:

> "Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity **or the amount of money due under a contract is not the type of issue here involved.** This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or material fact cannot be examined." [Emphasis added.] 346 U. S. at 435-436.

Unlike the **Wilko** case, however, the instant case **does** involve "the amount of money due under a contract," the type of issue which the Court's opinion in Wilko indicates is properly referable to arbitration. Indeed, it is significant that, as an illustration of a case concerning "the amount of money due under a contract," the Supreme Court cited **Agostini v. United States**, 4 Cir., 142 F. 2d 854, where the Fourth Circuit held that a suit under the Miller Act could be stayed for arbitration proceedings.

Apart from the **Agostini** case, other cases indicating that arbitration is allowable in a Miller Act setting are **United States v. Bregman Construction Corp.**, 6 Cir., 256 F. 2d 851, and **United States v. Al-Con Development Corp.**, 4 Cir., 271 F. 2d 851.[6] Although the contention here urged was

[6] The appellee has not cited a case to the contrary.

not really analyzed in the above cited cases, apparently due to the failure of the plaintiffs therein to press the point that the Miller Act precluded arbitration, it is significant that the Court in the **Bregman** case stated flatly:

> "Without question, in a proper situation, the Arbitration Act applies in proceedings under the Miller Act." 256 F. 2d at 853.

Having concluded that the Miller Act did not preclude the appellant from proceeding with arbitration, one further point remains to be considered. As an additional reason for its decision the District Court stated:

> "Another reason why this action should not be stayed is that the suit seeks to cancel or rescind for fraud both of the subcontracts. Should that phase of the suit be successful the entire contracts would be rescinded, including the agreement for arbitration. Lytle v. Scottish American Company, 122 Ga. 458, 466."

Where a contract comes within the purview of the United States Arbitration Act, federal not state, law controls as to whether a claim of fraud precludes arbitration of a dispute arising under the contract. **Robert Lawrence Company v. Devonshire Fabrics**, 2 Cir., 271 F. 2d 402. Under federal law, arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision itself was fraudulently procured. **Robert Lawrence Company v. Devonshire Fabrics**, supra. Since the appellee did not specifically claim that the provision for arbitration was procured by the fraud of the appellant,[7] we hold that the

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[7] The appellee did not allege that he was induced to enter into the agreements for arbitration through the fraud of the appellant, but merely that the agreements were "maliciously inserted" in the contracts by the appellant in that, by providing for arbitration

District Court erred in concluding that the appellee's claim for rescission of the contracts on the ground of fraud was a bar to arbitration.

The judgment is Reversed and the cause Remanded to the District Court for further proceedings consistent with the views expressed in this opinion.

Rives, Circuit Judge, Dissenting:

I agree with the district court's appraisal of the intention of Congress with respect to the two Acts here involved. The Arbitration Act, enacted in 1925, is limited in its application to issues "referable to arbitration under an agreement . . . " 9 U. S. C. A., § 3. Ten years later the Miller Act was enacted in 1935 with the provision that suits of the type here involved shall be brought "in the United States District Court for any district in which the contract was to be performed and executed **and not elsewhere**" (emphasis supplied), 40 U. S. C. A., § 270b (b), and with its even more explicit provision that every person who has furnished labor or material and has not been paid therefor within ninety days "**shall have the right to sue** on such payment bond for the amount . . . . unpaid at the time of institution of such suit **and to prosecute said action to final execution and judgment** for the sum or sums justly due him. . . . " (Emphasis supplied.) Government contractors were restricted in the kinds of agreements into which they might validly enter to those conforming to the public policy declared in the Miller Act.

The Heard Act, which was the predecessor of the Miller Act had also been intended to protect those whose labor

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in New York City, the appellant sought to make it inconvenient and expensive for the appellee, a Georgia corporation, to get paid under the contracts. This is hardly a sufficient allegation of fraud in the inducement of the arbitration agreements to prevent arbitration in accordance with the agreements.

or material had contributed to the prosecution of the work on Government contracts. Under the Heard Act the Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Thereafter other claimants could sue but had to join in a single action. As we commented in **Texas Construction Company v. United States**, 5 Cir., 1956, 236 F. 2d 138, 143, "it thus became essential that the place of such action be considered as a strict condition of the bringing of the suit since the right of all creditors might be completely cut off unless those conditions were strictly complied with." If the Heard Act were still in force no one could seriously urge the validity of the present agreement which provides: "Any controversy or claim arising out of or relating to this agreement or the breach thereof . . . shall be settled by arbitration in the Borough of Manhattan, City and State of New York, in accordance with the Civil Practice Act of the State of New York."

The majority quotes from **Texas Construction Company v. United States**, supra, the following passage: ". . . the requirement as to the district in which suit may be filed, contained in the Miller Act, is only one for the benefit of the defendants and may thus be waived by them, as may any other question of venue."

In the **Texas Construction Company** case that language was employed in connection with the holding that a prime contractor and his bonding company when sued in a district other than that in which the contract was to be performed and executed may waive objection to the place of suit. In that context, the language employed does not mean that the requirement of the Miller Act that suit be brought "in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere" was intended for the benefit of the defendants **to the exclusion of the plaintiffs**; it means

no more than that the requirement relates to venue rather than jurisdiction and may be waived by **both parties.**

There is nothing in the language of the Act, or in its legislative history, which would restrict to the defendants the benefit of that requirement. The propriety of extending its protection to the plaintiffs is shown by the observation of the district court:

> "The instant case strikingly demonstrates the purpose of Congress in thus providing an exclusive venue, and, it is believed, an exclusive forum for the resolution of Miller Act disputes. The inherent inconvenience and injustice of Moseley's being forced to transport himself, his records, and his witnesses from the scene of the activities under investigation to a point so distant as New York City is from Macon, Georgia, is readily apparent."

The prime contractor is in peculiarly favorable position to impose upon those who would enter into subcontracts with him burdensome agreements as to arbitration. The number of subcontractors from which the prime contractor may choose is limited only by the scope of the industry, while would-be subcontractors must seek the nod of a single prime contractor, who is in that respect a complete monopolist.

If, as must be conceded, the Heard Act protected those persons supplying the contractor with labor and materials against the imposition of such burdensome agreements, then, a fortiori, the Miller Act does no less. In **MacEvoy Co. v. United States**, 1944, 322 U. S. 102, 105, 106, the Supreme Court said:

> "The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on

its beneficiaries. There was no expressed purpos in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond."

United States v. Aetna Casualty & Surety Co., 2d Cir., 1962, 297 F. 2d 665, at page 667 points out:

"Every subcontractor and materialman not reimbursed for work done under a contract is given **an unqualified right to sue on the payment bond.**" (Emphasis supplied.)

In discussing the changes made between the Heard Act and the Miller Act, the court said, pages 668-669:

"The primary aim of the Miller Act was to secure greater protection for the subcontractor. The major changes were designed to streamline the cumbersome Heard Act machinery and to facilitate suit by those supplying labor or materials to the general contractor.

". . . The purpose of the Miller Act was clearly to provide a forum for all unpaid subcontractors." (Emphasis supplied.)

The court found such a strong public policy in favor of the protection of subcontractors and the furnishing of a forum in which they may proceed in court to enforce their right to prompt payment that it rightly concluded that, although the work was done outside the United States, and therefore was not within any judicial district, an unpaid subcontractor was nevertheless entitled to maintain his suit.

In this connection, the language which the court used on page 669 is most appropriate to the situation the plain-

tiff in this case would face if he were not permitted to prosecute his suit, when the court said:

> ". . . . with no forum for enforcement, the bond becomes an empty gesture, a stately farce carried out by contractors and sureties, at the public expense, and to the detriment of the very class the Miller Act was designed to protect. We cannot accept a construction which would lead to such a result."

The Miller Act provides to every person who has furnished labor or material not only the right to sue in the district in which the contract was to be performed and executed, but also the "right . . . . to prosecute said action to final execution and judgment." (Emphasis supplied.) That is diametrically opposite to being required to stay the action to await the result of an arbitration.

The holding of the majority in the present case places it within the power of prime contractors to insist on agreements for arbitration which might well nigh nullify the beneficent provisions of the Miller Act. That is not conducive to the efficient, economical and just performance of Government contracts. So thinking, I respectfully dissent.

A true copy.

Test:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth Circuit,

By Clara R. James,
Deputy.

(Seal)

New Orleans, Louisiana, Jn 27 1962.

PROVISIONS OF THE UNITED STATES ARBITRATION ACT.

As set out in 9 U. S. C., Secs. 1, 2 and 3.

1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. 401

UNITED STATES OF AMERICA,
for the use of H. W. MOSELEY, d/b/a MOSELEY PLUMBING AND HEATING COMPANY,
Petitioner

V.

ELECTRONIC & MISSILE FACILITIES, INC., formerly FIVE BORO CONSTRUCTION CORPORATION, and CONTINENTAL CASUALTY COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been published, but is contained in the record at pages 208-222.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief.

QUESTIONS PRESENTED

Basically, two questions are presented: (1) Do the venue and jurisdictional provisions of the Miller Act (40 USCA 270 a-d) repeal by implication the United States Arbitration Act (9 USCA 1-3) with respect to Miller Act transactions; (2) Do petitioner's other contentions raise any substantial federal issue which would justify the grant of certiorari.

STATUTES INVOLVED

The pertinent provisions of the Miller Act (40 USCA 270 b) are quoted by petitioner at page 5 of his brief, and the applicable portions of the United States Arbitration Act (9 USCA Sections 1, 2 and 3) are set out as an appendix to petitioner's brief at pages 50-51.

STATEMENT OF FACTS

The original complaint in this case was brought under the Miller Act, Title 40, USCA 270 (a-d). The facts are that the respondent, Electronic & Missile Facilities, Inc., formerly Five Boro Construction Corporation, bonded by respondent, Continental Casualty Company, (both of whom will be referred to as "respondent"), was prime contractor with the United States Government for the construction of Nike Hercules Facilities at Robins Air Force Base and Turner Air Force Base within the Middle District of Georgia. Petitioner, as a subcontractor of respondent, assumed under two written

subcontracts a certain portion of the work, including the plumbing, heating and air conditioning. (R. 196)

The complaint which sought to recover approximately One Hundred Twenty-five Thousand ($125,000.00) Dollars (in addition to approximately $405,000.00 which had already been paid) was brought in six counts for breach of two written subcontracts attached to the complaint as exhibits. One subcontract covers the work to be performed at Robins Air Force Base and the other subcontract covers the work to be performed at Turner Air Force Base. The provisions of the two subcontracts are identical, except as to amounts and location, and for the purpose of this brief may be treated as a single instrument. (R. 196, footnote 1)

The various counts of the complaint each alleged that petitioner had fully completed his work and that respondent had instituted arbitration proceedings under the terms of the subcontracts which would require petitioner to arbitrate the dispute over sums alleged to be due petitioner under the subcontracts; and that such arbitration should be restrained by the court in order to allow petitioner to prosecute his claim within the Middle District of Georgia. In the alternative, petitioner sought to rescind the contracts for fraud.

Respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted, and in lieu thereof, moved to stay the proceedings until an arbitration could be had in accordance with the express terms and conditions of the subcontracts sued upon. (R. 120-122)

The case came on for a hearing upon the motion filed by respondent and based upon the pleadings and the

depositions and affidavits on file in the case such motion was overruled and denied by the District Court on each and every ground, and a restraining order preventing arbitration previously granted was continued in full force and effect. (R. 196-201)

On appeal the United States Court of Appeals for the Fifth Circuit reversed the order of the trial court and remanded the case to the District Court with direction that the proceedings be stayed for the purpose of arbitration in accordance with the terms of the subcontracts sued upon. (R. 208-222)

ARGUMENT AND CITATION OF AUTHORITY

1.

It was not the legislative intent to make arbitration inapplicable in Miller Act cases.

The bold contention of petitioner for certiorari is that no Miller Act suit can be arbitrated and that as to Miller Act suits, the United States Arbitration Act has been impliedly repealed. There is nothing in the two Acts themselves which justifies this conclusion and if it is to be drawn it must be found in their legislative history.

The Miller Act came into being in 1935 as a modification of the Heard Act. The Heard Act [1] was originally enacted by Congress to protect the United States Government from defaulting contractors and at the same time to protect suppliers of labor and material from the same eventuality. It is evident from the provisions of the Heard Act that the primary purpose of the Act was the protection of the United States Government. Since the government was compelled to accept the lowest bid,

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[1] Act of August 13, 1894, Ch. 280, 28 Stat. 278.

it had no way of selecting only solvent contractors and as a consequence it had no assurance that the contract would be completed, hence, the provisions of the Heard Act requiring a bond in favor of the government conditioned on faithful performance. Collateral to such provision was the further provision that in the event of default, the government would bring one suit and unpaid suppliers of labor and material might intervene and recover pro rata their unpaid bills *after* the government had been paid. Since there was but one suit, and for the convenience of everybody, the Heard Act provided that the one suit be brought in the district where the work was performed.

The Heard Act turned out to be clumsy and unwieldly for the reason that unpaid suppliers had to wait, sometimes years, until the government brought its suit, and thus Congress in 1935 enacted the Miller Act. Only two substantial changes were made, the first being the provision that two bonds would be required, one in favor of the government and the other in favor of subcontractors and materialmen; and, second, the provision whereby unpaid materialmen and laborers might bring a separate suit if they were not paid within ninety days from the date they supplied the last labor and material. In the course of the House Committee hearings, [2] the surety companies argued that the single suit system should be continued so that they might be protected from paying out more than the limits of their bonds, since with separate suits being maintained in many jurisdictions they would be hard pressed to determine the

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[2] Bonds of Contractors on Public Works, Hearings before the Subcommittee on the Judiciary, 74th Cong., 1st Sess., Serial 4, Mar. 8, 22, Apr. 26, May 3, 1935, pp. 47-48.

status of payments in relation to the total amount of their bonds. To prevent this, the Miller Act as finally enacted retained the former provision of the Heard Act that all actions would be brought in a district where the work was performed, and as pointed out by the Second Circuit Court of Appeals in the case of *United States* v. *Aetna Casualty and Surety Company*, 2d Cir., 297 F. 2d 665, the venue or jurisdictional section of the Miller Act retained "scant utility save as a convenience to the defendants."

We, therefore, do not dispute the fact that the Miller Act, as contended by petitioner, is highly remedial in nature and entitled to a liberal constructon and application. It appears, however, that petitioner has obviously confused the relative position occupied by a supplier of labor or material operating without any contract with the prime contractor, with that of a subcontractor operating under a written subcontract entered into with the prime contractor. In the former case, a supplier of labor or material must rely on the provisions of the Miller Act to furnish him the same protection ordinarily furnished by the lien laws of the various states. The subcontractor, on the other hand, while nevertheless protected by the bond of the prime contractor, enjoys a direct contractural relationship with the prime contractor. As to such a subcontractor, therefore, there appears to be no valid reason to prevent him from entering into a subcontract with the prime contractor providing that disputes between them over amounts of money due shall be subject to arbitration.

Clearly, in enacting the United States Arbitration Act, the Congress intended and did announce a federal

policy in favor of arbitration of disputes, and to hold that the present case is not subject to arbitration would clearly amount to an implied repeal of the Arbitration Act, and no such implied repeal can be shown or inferred by the terms of the Miller Act or by its legislative history. Moreover the opinion of the Court of Appeals in holding the Arbitration Act applicable in this case is consistent with numerous decisions of this court holding that, "It is a cardinal principle of construction that repeals by implication are not favored. . . . The intention of the legislature to repeal 'must be clear and manifest.' . . . It is not sufficient . . . 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old.'" *Rosenberg* v. *United States*, 346 U. S. 371, 73 S. Ct. 1152, 97 L. Ed. 1607, 1619; citing *United States* v. *Borden Company*, 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181, 190.

2.

The decision of the Court of Appeals is in harmony with previous decisions of this Court.

In the case of *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 499, 55 S. Ct. 313, 79 L. Ed. 583, this court quoted with approval the opinion of Judge Learned Hand, wherein Judge Hand said:

"We see no reason for a limited construction (of the United States Arbitration Act) and conclude that Section 3 (the section of the Act authorizing a stay of proceedings) authorizes a stay even though the arbitration

must take place beyond the jurisdiction of the court." (*Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 2nd Cir., 70 F. 2d 297)

That there is no jurisdictional conflict between the Arbitration Act and the Miller Act can also be demonstrated by the very language of the Arbitration Act. The Act does not provide that the federal court shall lose jurisdiction, but that the further exercise of such jurisdiction shall merely be stayed pending arbitration. Manifestly, therefore, a proper construction of the two Acts would appear to be that if the suit be brought within a district in which the contract was performed, as required by the provisons of the Miller Act, either party might move for a stay of the action in accordance with the provisions of the Arbitration Act, and the parties to the contract might then arbitrate in accordance with the contract entered into by both and at any place where both had agreed to so arbitrate, but finally and at last, the judgment of the arbitrators would be entered in proceedings in the original district court action.

Nothing held by this court in *Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, relied upon by petitioner, is contrary to this reasoning. In the *Bernhardt* case this court simply held that Section 3 of the Arbitration Act was applicable only to agreements for arbitration in maritime transactions and contracts evidencing transactions in commerce. In the *Bernhardt* case jurisdiction was not based upon a federal question but on the basis of diversity of citizenship, and this court held, therefore, that under the mandate of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the right to arbi-

trate would depend on local law rather than federal law, the parties not being engaged in commerce or maritime transactions.

In support of its motion, petitioner also cites two cases arising under the Federal Employers Liability Act (*Boyd* v. *Grand Trunk Western Railroad Company*, 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55; and *Pope* v. *Atlantic Coastline Railroad Company*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094) as authority for the proposition that the Miller Act contains certain jurisdictional provisions which can not be waived. It is respectfully pointed out that these cases are not authority for such proposition and are clearly distinguishable by the language of the Federal Employers Liability Act which contains an express "non-waiver" provision declaring void any "contract, rule, regulation or devise whatsoever, the intent or purpose of which shall be to enable any common carrier to exempt itself from any liability created by this Act." [3] Because of this specific non-waiver provision, this Court held in the *Grand Trunk Western Railroad Company* case, supra, that an agreement which had the effect of depriving a claimant of his rights under the Act was void; and in the *Atlantic Coastline Railroad Company* case, supra, that a Georgia court did not have the right to deprive a claimant resident of that state from maintaining a suit in a foreign state.

Equally distinguishable, and on the same basis, is the case of *Wilko* v. *Swan*, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168, cited by petitioner in support of the same proposition. In that case this court, in interpreting the Securities Act of 1933, held void a contract signed by

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[3] Federal Employers Liability Act, 45 USCA 55.

the customer of a securities house wherein he waived his right to sue for the reason that the Securities Act of 1933 declared void any "condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision"[4] of the Act.

The Miller Act contains no such provision.

3.

The decision of the Court of Appeals is in harmony with decisions of other Circuit Courts and no conflict exists.

Although petitioner says that the present case is in conflict with the decisions of other circuit courts, he cites no authority and, it is respectfully submitted, no conflict exists. On the contrary, other circuit courts have recognized the arbitrability of Miller Act cases.

In at least three Miller Act cases, *United States* v. *Bregman Construction Corporation*, 6th Cir., 256 F. 2d 851; *United States* v. *Al Con Development Corporation*, 4th Cir., 271 F. 2d 904; and *Agostini Bros. Building Corporation* v. *United States*, 4th Cir., 142 F. 2d 854, other circuit courts have indicated that arbitration is allowable in a Miller Act case. While admittedly these cases do not squarely raise the point, they are certainly physical precedents, and significantly enough in the *Bregman* case the court categorically held that "without question, in a proper situation, the Arbitration Act applies in proceedings under the Miller Act."

4.

A Miller Act case is peculiarly suited for arbitration.

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[4] Securities Act of 1933, 15 USCA 77n.

The Court of Appeals in its opinion in this case observed that if it could be shown that disputes arising under the Miller Act involved "complicated and sophisticated legal issues which can not readily be resolved by arbitrators untrained in the law," then perhaps some merit might be found in petitioner's argument that Miller Act suits are not subject to arbitration. It is interesting to note that this court in the case of *Wilko* v. *Swan*, supra, listed, as illustrating a situation peculiarly suited to arbitration, a case where "the amount of money due under a contract" was involved, and cited *Agostini Bros. Bldg. Corp.* v. *United States*, supra, a case decided by the Fourth Circuit wherein a Miller Act suit was arbitrated. The case at bar, as do virtually all Miller Act cases, turns primarily on "the amount of money due under a contract," and would therefore appear to be, as this court says, one peculiarly suited for arbitration.

5.

The contract in question evidences a transaction involving commerce.

The Court of Appeals held, and it is undisputed in the record, that "a New York corporation contracted with appellee, a Georgia corporation, to do the work within the State of Georgia; that appellant sent substantial supervisory personnel across the state lines, and received supplies and equipment across state lines. Working on the projects were subcontractors from states other than Georgia. Moreover, the facility involved is an integral part of a transcontinental system joined and holding hands with facilities already in commerce in other states and countries by radio and telephone communications, and further joined with numerous other military

bases already in commerce from almost the North Pole to Puerto Rico in a single giant network of air bases and communication facilities." (R. 210 Footnote 3)

Contrary to the argument advanced by petitioner, this court has rejected the theory that a war instrument is excluded from interstate commerce in the case of *Powell* v. *United States Cartridge Company*, 339 U. S. 497, 94 L. Ed. 1017. This court has also rejected the "new construction" doctrine and on at least two occasions has held that contracts involving work substantially identical to that in the case at bar involved interstate commerce. The two cases in point are *Mitchell* v. *Lublin, McGaughy & Associates, et al.*, 358 U. S. 207, 3 L. Ed. 2d 243, and *Mitchell* v. *C. W. Vollmer & Company*, 349 U. S. 427, 99 L. Ed. 1196.

In this connection see also the case of *Metro Industrial Painting Corp., et al.* v. *Terminal Construction Company, Inc.*, 2nd Cir., 287 F. 2d 382, involving facts almost identical to the case at bar; and see also the case of *Goldberg, et al.* v. *Five Boro Construction Corp.*, 291 F. 2d 371, wherein the First Circuit Court of Appeals in a case involving respondent, Electronic & Missile Facilities, Inc. (at a time when its name was Five Boro Construction Corporation) specifically held this very company to be in commerce while engaged on a project similar in every respect to the project involved under the contracts in the case at bar.

6.

Petitioner's contention that the contracts were subject to rescission is without merit.

It appears to us that if the foregoing issues do not

justify the grant of certiorari, as we contend, then certainly this court would not grant certiorari to review the simple legal question whether the contracts could be rescinded for fraud. However, since the issue is argued by opposing counsel, we would point out that petitioner completed his contract before insisting that he was entitled to rescind and that he had before him during the course of the work all facts which might give him a right to rescind. Whether this case be construed by the law of Georgia or whether it be construed by the federal law, the results are exactly the same. As held by the Court of Appeals, "under federal law arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision was fraudulently procured, *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 2nd Cir., 271 F. 2d 402."

On the other hand, if state law be controlling, then the principle is universal that where a right to rescind exists, the party entitled to rescind must act promptly, leaving no doubt as to his election to rescind, and adhere to the position taken. 3 *Williston* (Contracts), Section 688; 12 *Am. Jur.* 1029 (Contracts), Section 447; 12 *Am. Jur.* 1030 (Contracts), Section 449; *Pearson* v. *George*, 209 Ga. 938, 945 (77 S. E. 2d 1).

In either event no substantial federal issue is presented.

CONCLUSION

It is most respectfully insisted that the case at bar is in harmony with decisions of this court and of other circuit courts; that it has been correctly decided by the

Court of Appeals; and that certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 401.

UNITED STATES OF AMERICA for the Use of H. W. MOSELEY, d b a MOSELEY PLUMBING AND HEATING COMPANY,
Petitioner,

vs.

ELECTRONIC & MISSILE FACILITIES, INC., et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit with the dissenting opinion of Judge Rives is reported at 306 F. 2d 554 and appears in the record at pages 125-136.

The opinion of the District Court is contained in the record, pages 120-124.

JURISDICTION.

The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1). Certiorari was granted December 3, 1962.

STATUTES INVOLVED.

The questions presented involve Secs. 1, 2 and 3 of the United States Arbitration Act and Sec. 2 of the Miller Act.

The Sections of the United States Arbitration Act here involved are set out in 9 U. S. C. 1, 2 and 3. Because of their length they are set out in full in the Appendix to this petition.

Sec. 2 of the Miller Act is set out in Act August 24, 1935, c. 642, Sec. 2, 49 Stat. 794, as amended by Act August 4, 1959, pub. L. 86-135, Sec. 1, 73 Stat. 279, and is now set out in 40 U. S. C. 270b as follows:

> "(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided However, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such persons did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the

name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit."

QUESTIONS PRESENTED

(1) The primary question presented by this petition is whether, in a suit under the Miller Act (40 U. S. C. 270 b) against a prime contractor and its surety by an unpaid subcontractor, the prime contractor and surety are entitled to a stay of such Miller Act suit to have the claim of the subcontractor determined by arbitration under provisions of the subcontract, or whether, on the other hand, such unpaid subcontractor is entitled to prosecute said action to final execution and judgment.

Respondent, Electronic & Missile Facilities, Inc. (formerly Five Boro Construction Corporation) was the prime contractor and respondent Continental Casualty Company was its surety in contracts with the United States of

America for the construction of Nike-Hercules facilities, one contract being for construction of such facilities at Robins Air Force Base Defense Area, Georgia and the other for facilities at Turner Air Force Base Defense Area, Georgia, both of which Air Bases are located within the Middle District of Georgia. The use petitioner, H. W. Moseley, d/b/a Moseley Plumbing and Heating Company, entered into written subcontracts with the prime contractor under which Moseley was to do the plumbing and heating work in the construction of each of said facilities. After the work had been completed Moseley filed this suit in the District Court for the Middle District of Georgia under the Miller Act seeking to recover various sums to which he contended he was entitled and which were unpaid. The suit sought an injunction against the prime contractor's proceeding with an arbitration proceeding which had been commenced by it against Moseley in the City of New York under the purported authority of provisions of the subcontract. That defendant was temporarily restrained from proceeding with the purported arbitration. The defendants filed a motion to dismiss, or in lieu thereof to stay, the suit until an arbitration should be had in accordance with the provisions of the contracts. The District Court after a hearing determined the question adversely to the defendants, respondents herein, holding that the provisions of the United States Arbitration Act cannot be invoked in a Miller Act case so as to stay the proceedings in such case and compel unwilling arbitration, and accordingly denied the alternative motions to dismiss and to stay the proceedings and continued the temporary restraining order in force. On appeal the United States Court of Appeals for the Fifth Circuit, in a two to one decision, reversed the judgment of the District Court and held, with one Judge dissenting, that the provisions of the contract with reference to arbitration were valid and enforceable and the defendants were entitled to a stay of the Miller Act suit until arbitration had

been had. This Court granted certiorari on December 3, 1962.

The question thus presented is whether, as held by the majority of the Court of Appeals for the Fifth Circuit, an unpaid subcontractor, in spite of the explicit provision of the Miller Act that he "shall have the right to sue . . . and to prosecute said action to final execution and judgment for the sum or sums justly due him," must nevertheless have his suit stayed and submit his claim instead to arbitrators for determination where he has signed a subcontract purporting to so provide, or whether, on the other hand, as held by the District Court and the dissenting opinion of the Court of Appeals, the provisions of the United States Arbitration Act for compelling arbitration, are inapplicable to suits under the Miller Act adopted ten years after the Arbitration Act, for the reason that the explicit provision that persons occupying the position of an unpaid subcontractor "shall have the right to sue . . . and to prosecute said action to final execution and judgment" render unenforceable a provision inserted in a subcontract by a prime contractor or purporting to take away those rights so explicitly stated by Congress.

(2) The second question presented is whether the subcontracts between Moseley and the prime contractor for the plumbing and heating work at these Nike-Hercules facilities were contracts "evidencing a transaction involving commerce" within the meaning of the United States Arbitration Act. This question would be reached only in the event the primary question above stated should be decided adversely to petitioner's contention. The District Judge found it unnecessary to determine this question, stating "assuming but not deciding that the subcontract here sued upon comes within the ambit of Sec. 2 of the Arbitration Act" (R. 121), while the Court of Appeals for the Fifth Circuit held the Arbitration Act was applicable to these contracts (R. 126-127).

STATEMENT OF CASE.

The facts as to the primary question are not in dispute because this question was decided by the District Court and the Court of Appeals for the Fifth Circuit and will be decided by this Court upon the basis of the facts alleged in the complaint and the law applicable thereto.

Suit was brought by petitioner under the provisions of the Miller Act to recover sums due and unpaid to him as a subcontractor who had furnished labor and material in the prosecution of the work provided for in the contract between the defendant contractor and the United States of America. The complaint was brought in six counts. Counts I and II seek recovery directly on the contracts, count I relating to the contract for the work at Robins Air Force Base Defense Area near Warner Robins, Georgia, and count II relating to the contract for work at Turner Air Force Base Defense Area, near Albany, Georgia. The complaint attached copies of the subcontracts, which were on printed forms with blanks filled in by typewriter as to the name and address of the subcontractor, identification of the prime contract, the contract amount and the description of the work covered by the subcontract. The printed subcontract forms covered 13 pages, and thus were in fine print as compared to their appearance in the record, where the subcontract covering the work at Robins Air Force Base Defense Area covers 34 pages, being set out at pages 17-50. It is stipulated (R. 50-51) that the subcontract for the work at Turner Air Force Base Defense Area is identical except for the location of the work and the amount of the contract price. Count I alleged the defendant was indebted to the plaintiff in the sum of $71,900.57 on the Warner Robins Air Force Base Defense Area contract, and count II alleged an indebtedness of $44,970.10 on the Turner Air Force Defense Area contract. It was alleged that paragraph 26 of

the subcontract purports to provide that any controversy or claim arising out of said contract shall be determined by arbitration, but it was alleged that said provision for arbitration is void and unenforceable because (a) it is contrary to public policy in that it is in direct violation of the express provisions of the Miller Act, (b) it is an attempt to oust the Federal District Court of jurisdiction and to deprive petitioner of benefits intended by the Miller Act, . . . (e) it is unreasonable and arbitrary and its enforcement would work a hardship upon petitioner to the extent of depriving him of the rights intended to be granted by the Miller Act in that it would require presentation of evidence before a foreign forum many hundreds of miles removed from the place where the work was performed and where petitioner's witnesses would be available and petitioner would not be able to compel the presence of witnesses at such distant place, as more fully set out in the record, pages 4-5. It was alleged that in spite of the invalidity of said arbitration provision the defendant contractor had filed in the Supreme Court of the State of New York, County of New York, a purported arbitration proceeding, had procured an order setting a hearing for February 28, 1961, and had purported to serve the same upon petitioner by mail, and unless temporarily restrained and enjoined said defendant would proceed with said purported arbitration to the irreparable injury and damage of petitioner (R. 5).

It was further alleged (R. 5) that petitioner could not adequately present the facts relating to his claim against defendants in said arbitration proceedings because compulsory process to require the presence of witnesses from the Middle District of Georgia in the Supreme Court of the State of New York, more than 700 miles from the Middle District of Georgia would not be available.

It was further alleged (R. 5) that the Miller Act requires that a suit be commenced within one year after the

last labor was performed or material was supplied and all of petitioner's rights under said Act would be lost if he participated in arbitration proceedings and the same were not concluded within one year from the date when the last work was performed or material supplied by petitioner. Each of these counts prayed that the defendant contractor be temporarily and permanently enjoined from proceeding with the purported arbitration in New York.

Count III, with respect to the Warner Robins Air Force Base Defense Area contract, and Count IV, with respect to the Turner Air Force Base Defense Area contract, seek to rescind the contracts because of fraud on the part of the defendant prime contractor and to recover in quantum meruit $95,678.79 and $96,335.88, respectively, as well as $20,000.00 on each count as attorneys' fees and other expenses of litigation to which petitioner claims to be entitled because of the bad faith, misconduct, fraud, malice and oppression on the part of the defendant prime contractor alleged in those counts. These counts adopted all of the pertinent allegations of the previous counts with respect to the pendency of the purported arbitration proceedings in New York, the contentions of petitioner as to the invalidity of the provisions of the contract relating to arbitration, the inability of petitioner to adequately present the facts relating to his claim in such arbitration proceedings, and the necessity for said proceedings to be enjoined, and likewise prayed for a temporary and permanent injunction against the defendant contractor's proceeding with such arbitration.

The fraud which petitioner claimed entitled him to rescind the contract was that the defendant prime contractor "has been guilty of the grossest kind of misconduct, fraud, malice and oppression in its entire dealings with Moseley Plumbing and Heating Company in connection with said work and said contract in that it conceived and executed

a fraudulent and illegal scheme, plan and design to perpetrate a fraud upon Moseley Plumbing and Heating Company, and other subcontractors as well, by causing said Moseley, as well as other subcontractors, to furnish materials and labor for said project with the intention on the part of said defendant of obtaining a large portion of said work and materials without paying therefor or by browbeating Moseley and said other subcontractors into accepting much less than their real value, which said plan, scheme and design was conceived, executed and perpetuated upon Moseley in the following particulars: . . ." (R. 9).

Then follow the particulars as to how said fraudulent scheme was carried into effect, set out in the various subparagraphs (R. 9-12) which may be summarized as follows:

(a) The defendant represented it was a general contractor and that the work to be done by Moseley was that spelled out in the typewritten part of the printed subcontract, whereas in truth that defendant had no intention of performing the proper function of a general contractor by doing substantial parts of the work itself and supervising and coordinating the work of subcontractors but instead intended to and did subcontract substantially all of the work and itself had no employees except for a project superintendent and a handful of laborers.

(b) Pursuant to that plan of operation said defendant fraudulently and with malice inserted into its printed subcontract form provisions purporting to authorize it to require Moseley or other subcontractors to do any work whatever, regardless of whether it bore any proper relation to the work called for in the main typewritten portion of the subcontract, which provisions were inserted with the specific malicious intent of using them to give color to and to act as a specious cover for directives to do work

in no way connected with the plumbing and heating called for by Moseley's subcontract and with the intention of avoiding payment under the false and fraudulent contention that the work was covered by such subcontract, and if it could not get Moseley to accept the work as part of the subcontract to get him to accept a greatly reduced amount of compensation in order to avoid litigation and to obtain money with which to pay his creditors.

(c) Said defendant did issue numerous directives to Moseley to do work which the defendant knew was not covered by the contract but defendant in bad faith and maliciously as a part of said scheme contended it was so covered, and defendant's bad faith in this connection was so great that it discharged from its employ its project superintendent who attempted to be honest and agreed with Moseley and other subcontractors that work called for by such directives was not covered by the subcontract and that he should receive additional compensation therefor.

(d) As a part of said scheme the defendant issued a large number of such directives so as to greatly increase the amount of work to be done by Moseley and increase his capital outlay and, at the same time, withheld payments to which Moseley was entitled, with the express purpose and intent of producing financial pressure upon Moseley with the intention of forcing him to settle with them for a price far below the real value of such additional work.

(e) This scheme of producing financial pressure on Moseley was a general scheme which said defendant applied to all subcontractors in order to squeeze profits for itself from the financial sacrifices it was attempting to cause said subcontractors to make, which plan was carried to complete fruition both with respect to Moseley and every other subcontractor, practically all, if not all of

the subcontractors becoming insolvent by the time the project was completed.

(f) As a further part of said scheme said defendant carried out a practice of making back charges against each of the subcontractors and Moseley by which it billed them for enormous and outrageous charges for work allegedly covered by the subcontract and allegedly done by said defendant, when the defendant in truth knew that the work for which the back charges were made was not a part of the subcontract and the charges were maliciously made in an effort to reduce the compensation to which Moseley was entitled, and, for various work not covered by any subcontract but plainly required to be done by said prime contractor, that defendant allegedly prorated the cost between each of the subcontractors but in fact actually charged the total cost of such work to each of such subcontractors, and in addition the defendant attempted to charge Moseley the cost of work performed by other subcontractors clearly covered by their subcontracts and not covered by Moseley's subcontract.

(g) The provisions of the subcontract purporting to require arbitration of any claim or dispute in New York were maliciously inserted in furtherance of the express purpose of the defendant to obtain work and material without paying therefor and with the intention on the part of the defendant of causing a purported arbitration in New York, at least 700 miles from the Middle District of Georgia, where it knew and intended that Moseley and other subcontractors could not properly appear and present their evidence and claims because of the impossibility of compelling the attendance of witnesses at such great distance and because of being financially unable to do so because of the financial stress intentionally produced by the defendant, all with the intention of having allowed in favor of the defendant in such arbitration proceeding all of the false and fraudulent claims of defendant that Mose-

ley was not entitled to compensation for extra work done under directives from that defendant and of having allowed their false and fraudulent back charges and with the intention of defeating the right of Moseley and other subcontractors to have their legitimate claims litigated in the United States Court for the Middle District of Georgia as expressly provided by the terms of the Miller Act.

Counts V and VI sought recovery for work done under the contracts at Robins Air Force Base Defense Area and Turner Air Force Base Defense Area, respectively, under the alternative theory that, even if petitioner could not show full performance of all terms of the subcontract so as to be entitled to recovery on the contracts themselves under Counts I and II, and even if petitioner should be unable to establish a right to rescind the contracts as sought in Counts III and IV, petitioner was nevertheless entitled to recovery of the reasonable value of the labor and materials furnished by petitioner and retained by the defendant, less payments made by defendant and any legitimate damages which may have been suffered by the defendant. These counts adopted all of the same allegations as to the purported arbitration proceedings, the invalidity of the contract provisions with respect to arbitration, the inability of Moseley to properly present his claims in the arbitration proceedings, and the necessity of enjoining such proceedings.

Upon filing and presentation of the verified complaint a temporary restraining order was entered restraining the defendant prime contractor from further proceedings in connection with his application for arbitration in New York, and thereafter the restraining order was continued in effect by consent of all parties.

The defendant prime contractor filed its motion to dismiss, or in lieu thereof, to stay the proceedings until an

arbitration should be had in New York in accordance with the terms of the subcontract. Upon the hearing of this motion there was introduced an affidavit of Nathan Cohen, Executive Vice President of the defendant prime contractor, to the effect that the Nike installations at the Warner Robins Air Force Base Defense Area and the Turner Air Force Base Defense Area are four of approximately seven hundred different bases for anti-aircraft defense tied together by a system (SAGE) with headquarters in Colorado, consisting of bases stretching across Canada, Texas towers at sea, radar stations and communication centers along both seaboards of the United States and BOMARC and Nike stations scattered throughout the United States, that the Nike stations erected at Robins Air Force Base Defense Area and Turner Air Force Base Defense Area are designed not only to protect the Strategic Air Command bomber bases at those locations but to intercept enemy planes coming from abroad heading towards other installations in the United States, and that they are an integral part of an intercontinental defense system and were constructed to enlarge the existing facilities for such systems.

There was introduced also the deposition of Major John W. Poston, a witness for the petitioner, who was operations officer of an artillery missile battalion charged with the operation of the facilities constructed at the Robins Air Force Base Defense Area. His testimony showed that the areas where these facilities were constructed were previously open land and forest with no improvements whatever, located about 15 to 17 miles from Warner Robins Air Force Base and Turner Air Force Base, respectively, that there were at these locations after completion of construction no facilities for operation of aircraft, but the primary purpose and functions of the installations was to launch missiles that would intercept enemy planes to defend the country in the event of hostile attack.

It was clear from Major Poston's testimony that even after full completion of the construction contract by the prime contractor the facilities had not, and could not, become a part of the defense system detailed in his testimony and in the affidavit of Cohen, but that it was necessary for the Army then to install a tremendous amount of equipment; such as cabling systems, computers, launchers, radar controls, antennas, and assembling equipment, and it had to bring in missile components and build them into missiles and place them on the launchers which the Army had installed, develop security systems, set up systems for housing, feeding and administering troops, move in troops and then tie the facilities in by communications to other parts of the defense system (R. 76-78). He testified (R. 97-98) that after full completion of the contract by the prime contractor, it was necessary for the Army to do $200,000.00 worth of labor and install $7,000,000.00 worth of equipment at each of two different locations at Warner Robins Air Force Base Defense Area and two locations at Turner Air Force Base Defense Area. Thus the total labor left to be done by the Army was some $800,000.00 worth, and the total cost of equipment which had to be installed was approximately $28,000,000.00, all of which was necessary in order for the facilities, after completion of the prime contractor's construction, to become a part of the defense system.

The only evidence related to the nature of the construction. The primary question as to the enforceability of the arbitration provisions of the contract, and the right of the defendant prime contractor to a stay of the Miller Act suit was determined as a question of law on the basis of the allegations in the complaint.

It is significant that the provisions of the subcontract with respect to arbitration do not require that there be any dispute between the parties. It purports to provide

even that any claim under the contract shall be submitted to arbitration. That provision is: "Arbitration: Twenty-Sixth: (a) Any controversy or claim arising out of or relating to this agreement or the breach thereof, provision for the determination of which is not made elsewhere in this agreement, shall be settled by arbitration in the Borough of Manhattan, City and State of New York in accordance with the Civil Practice Act of the State of New York. The Contractor and the Subcontractor agree that any application by either side for the appointment of an arbitrator in accordance with this paragraph shall be made in the Supreme Court of the State of New York, County of New York, and that said Court shall have jurisdiction over every party in connection with any such arbitration. The cost of such arbitration shall be borne equally" (R. 42).

Although the majority opinion of the Court of Appeals for the Fifth Circuit contains the statement (R. 129): "The appellee has not even attempted to demonstrate how or why he would be prejudiced by having this dispute settled by arbitration rather than in the federal courts"; the case was decided both in the District Court and in the Court of Appeals on the basis of the allegations of the complaint, and thus there is absolutely no dispute in the record of the allegation in paragraph 15 of count I (R. 5), which is adopted in each of the other counts, that "petitioner could not adequately present the facts relating to his claim against defendants in said arbitration proceedings because compulsory process to require the presence of witnesses from the Middle District of Georgia in the Supreme Court of the State of New York, more than 700 miles from the Middle District of Georgia would not be available". Likewise there is in the record no dispute with respect to the allegations of subparagraph (g) of paragraph 2 of count III (R. 11-12), adopted in counts IV, V and VI, that: "The provisions in said subcontract

purporting to require an arbitration of any claim or dispute in the State of New York was maliciously inserted in said contract in furtherance of the express purpose of defendant to obtain work and materials without paying therefor with the intention on the part of said defendant of causing a purported arbitration of all such claims in the State of New York at least 700 miles distant from the Middle District of Georgia where it knew and intended that Moseley and other subcontractors could not properly appear and present their evidence and claims because of the impossibility of compelling the attendance of witnesses at so great distance and because of being unable financially to do so because of the financial stress intentionally produced by defendant, all with the intention of having allowed in favor of said defendant in such proceeding all of the false and fraudulent claims of defendant that extra work done by Moseley and other subcontractors was covered by their subcontracts when in fact it was not, and of having allowed their false and fraudulent back charges against Moseley and other such subcontractors as hereinbefore alleged, all with the intention of defeating the right of Moseley and other subcontractors to have its legitimate claims litigated in this Honorable Court as expressly provided by the terms of the Miller Act."

The basis for Federal jurisdiction in the court of first instance is the provision of the Miller Act, set out in 40 U. S. C. 270b (b) that

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit. . . ."

SUMMARY OF ARGUMENT.

1. When Congress creates a private right in the public interest and provides a specific remedy for its violation the right may not be destroyed by obtaining from the intended beneficiary a waiver or release of the remedy in advance of the accrual of the right.

2. The Miller Act was specifically designed to protect those whose labor and material has contributed to the public work, and it is to be liberally construed to effectuate this Congressional policy.

3. Substitution of arbitration at a distant place for a suit in the United States Court for the district in which the work was performed substantially destroys the right granted by Congress.

4. The specific purpose and intent of Congress unequivocally expressed in the Miller Act would be thwarted by staying a suit by an unpaid subcontractor to force unwilling arbitration.

5. The United States Arbitration Act is not applicable.

ARGUMENT.

1. When Congress creates a private right in the public interest and provides a specific remedy for its violation the right may not be destroyed by obtaining from the intended beneficiary a waiver or release of the remedy in advance of the accrual of the right.

In **Brooklyn Savings Bank v. O'Neil, 324 U. S. 697, 65 S. Ct. 895, 89 L. Ed. 1296,** this Court held void an agreement by an employee to release his employer from liability for liquidated damages for failure to pay the minimum wages provided by the Fair Labor Standards Act. It is important to bear in mind that in that case the right had already accrued and the employee had been paid overtime compensation which had accrued and at the time of the payment thereof had signed a release of all other rights under the Act. Thereafter he brought suit to recover the liquidated damages due him under the Act.

This Court, in holding that the release was void, said, p. 704 of 324 U. S.:

> "'It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. . . . Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will be not allowed where it would thwart the legislative policy which it was designed to effectuate.'"

It was argued in that case that Congress did not intend for such waiver of rights to be void because it had in other acts specifically provided that waiver of rights there

granted would be void, but had not so provided in this act. In rejecting that contention, this Court said (p. 713):

> "Absence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative policy would be thwarted by permitting such contracts. The decision in the instant case is based on the legislative policy behind this enactment . . ."

In **Boyd v. Grand Trunk Western Railroad Co., 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55,** this Court held void an agreement by an injured railroad employee that any suit he brought would be brought in the state where he lived and was injured. This Court said, 339 U. S. (p. 266):

> "The right to select the forum granted in Sec. 6 is a substantial right. It would thwart the express purpose of the Federal Employer's Liability Act to sanction defeat of that right by the device at bar."

Again it is important to bear in mind that the agreement of the employee in that case was executed after he had already received injuries in his employment.

Although the court found that the agreement procured from the employee by the employer was prohibited by Sec. 5 of the Act which says that any contract which would enable any common carrier to exempt itself from any liability created by the act shall be void, the real basis of the decision was the fact that the agreement restricting the wide choice of forum given by the act would thwart the express purpose of the act. It had already been decided in **Brooklyn Savings Bank v. O'Neil,** supra, that, even in the absence of any express prohibition, a waiver of rights granted by Congress in the public interest was void where the legislative policy would be thwarted by permitting such contracts.

In **Wilko v. Swan, 346 U. S. 427, 435-438, 98 L. Ed. 168, 175-177, 74 S. Ct. 182,** this court held void an agreement to arbitrate any controversy which was contained in a margin agreement for the purchase of securities.

In that case the Court of Appeals for the Second Circuit had held in **Wilko v. Swan, 201 Fed. 2d 439,** at p. 444:

> "We think that the remedy a statute provides for violation of the statutory right it created may be sought not only in any 'court of competent jurisdiction' but also in any other competent tribunal such as arbitration . . ."

This Court reversed that philosophy and held to the opposite that the remedy a statute provides for violation of the statutory right it created is part and parcel of the right itself and the remedy may not be waived and an agreement to arbitrate substituted for it. This Court pointed out that the provisions of the Securities Act of 1933 were designed to protect investors and require dealers, etc., to make full and fair disclosure of the character of securities sold and to prevent fraud in their sale, and then said, 346 U. S., p. 431:

> . . "To effectuate this policy, Sec. 12 (2) created a special right to recover for misrepresentation which differs substantially from the common law action . . ."

The Court then adopts the argument of the petitioner that "the purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act", and "that arbitration lacks the certainty of a suit at law under the Act to enforce his rights."

The Court says (p. 435):

> "and we think the right to select the judicial forum is the kind of 'provision' that cannot be waived under

Sec. 14 of the Securities Act. That conclusion is reached for the reasons set out above in the statement of petitioner's contentions on this review. . . .

"When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary."

In **Pope v. Atlantic Coastline Railroad Company, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094**, this Court reversed a decision of the Supreme Court of Georgia which had held that a Court of Equity in that state could restrain a resident of the state from maintaining a suit in a court of a foreign state upon a cause of action arising in Georgia under the Federal Employer's Liability Act, where the foreign suit had for its purpose or necessary effect the obtaining of an inequitable or unconscionable advantage over the defendant.

This Court in that case again applied the principle that a cause of action given to a private party in the public interest by an Act of Congress can not be fettered where the purpose of Congress would thus be thwarted. The Court held that the right of an injured employee to bring suit in one of the forums provided by the Act could not be thus restricted, saying (p. 383):

"Congress has deliberately chosen to give petitioner a transitory cause of action, and we have held before . . . that Sec. 6 displaces the traditional power of a state court to enjoin its citizens on the ground of oppressiveness . . . from suing . . . in the state courts of another state."

Other opinions in accordance with the principle established by the foregoing decisions of this Court have been rendered by the Circuit Court of Appeals.

"Where a new right is created by statute, unknown to the common law, and the mode in which it may be enforced is specifically provided, the prescribed mode measures the extent of the power, and the right can be enforced in no other manner."

United States v. Southern Dredging Co., 251 Fed. 400.

"We think the inclusion of this section in the Employers' Liability Act, with its creation of new obligations against the employer, makes the venue provision an inherent part of the employer's liability. An attempt to limit it by contracts is an attempt to exempt the railroad from liability, and is void. . . .

"Also we think that public policy prohibits the recognition and enforcement of such contracts limiting the rights of parties in their access to the courts. Like the rights bestowed upon employees under the Fair Labor Standards Act, 29 U. S. C. A., Section 201 et seq., the rights of the employee under the Federal Employers' Liability Act are statutory rights 'conferred on a private party, but affecting the public interest.' It was held in **Brooklyn Savings Bank v. O'Neil, 324 U. S. 697, 65 S. Ct. 895, 900, 89 L. ed. 1296,** that such rights may not be released or waived."

Akerly v. New York Central Railroad Co., C. C. A. 6, 1948, 168 F. 2d 812.

In United States v. Leahy, C. C. A. 3, 1945, 148 F. 2d 462, the parties had entered into an agreement with reference to war risk insurance on ships by which 75% of the value was paid, and it was contended that under the provisions of the payment the libellant was required to pro-

ceed in the Court of Claims for collection of the difference. The Court held (pp. 466-467):

> "Determination of insurance claims is specifically within the exclusive jurisdiction of the District Court under Section 225 of the Merchant Marine Act, 1936, as amended which provides actions are to be brought according to the provisions of The Suits in Admiralty Act . . . The parties by their contract would have no power to oust the District Court of such jurisdiction . . ."

Thus in many analogous situations wherever a new right in favor of a private party has been created by an Act of Congress in the public interest and the method of enforcing the rights therein granted has been specifically provided by Congress, this Court and the various circuit courts have firmly established the principle that the right can be enforced in the manner provided in the statute, and that any attempt to curtail or restrict those rights is void.

2. **The Miller Act was specifically designed to protect those whose labor and material has contributed to the public work and it is to be liberally construed to effectuate this Congressional policy.**

This Court, in **MacEvoy Company v. United States, 1944, 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163,** at pages 105-106 of 322 U. S., held:

> "The Heard Act, which was the predecessor of the Miller Act, required Government contractors to execute penal bonds for the benefit of 'all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract. We consistently applied a liberal construction to that statute, noting that it was remedial in nature and that it clearly evidenced the intention of Congress

to protect those whose labor or material has contributed to the prosecution of the work' . . .

"**The Miller Act**, while it repealed the Heard Act, reinstated its basic provisions and **was designed primarily to eliminate certain procedural limitations on its beneficiaries.** There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; **the intent rather was to remove the procedural difficulties** found to exist under the earlier measure and thereby **make it easier for unpaid creditors to realize the benefits of the bond.**"

The Court, in a footnote, pages 105-106, says:

"Under the Heard Act, a single bond was required to protect both the Government and the suppliers of labor and materials. The Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. **Serious inconveniences and delays resulted. The claimants, often in need of immediate funds, were compelled to settle meritorious claims for less than the full amount. The Miller Act was designed to meet these difficulties** by requiring that the prime contractor execute two bonds—a performance bond to protect the Government and a payment bond to protect the creditors. Creditors can sue on the latter bond without waiting for the Government and even without waiting for completion of the project. Each creditor may sue separately ninety days after the labor is completely performed or materials fully supplied." (Emphasis supplied.)

The majority opinion of the Court of Appeals for the Fifth Circuit permits a result diametrically opposed to the specific intent of Congress as thus declared by this Court.

It is alleged in this complaint that the defendant contractor conceived and executed a fraudulent and illegal scheme, plan and design to perpetrate a fraud upon Moseley "by causing said Moseley . . . to furnish materials and labor . . . with the intention on the part of said defendant of obtaining a large portion of said work and materials without paying therefor or by browbeating Moseley . . . into accepting much less than their real value . . . ." (R. 12), and that one of the means by which said contractor carried this plan, scheme and design into effect was by the insertion in the printed subcontract of the provisions purporting to require arbitration of any claim or dispute in New York (R. 16).

In other words, petitioner alleged that the prime contractor conceived a fraudulent scheme to accomplish precisely what this Court said in the above case that the changes which the Miller Act made in the Heard Act were intended by Congress to prevent.

In **United States v. Carter, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776,** this Court held (pp. 216-217):

> "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate **the Congressional intent to protect those whose labor and materials go into public projects** . . .
>
> "The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings. **The essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material** . . ." (Emphasis supplied.)

In **United States v. Aetna Casualty & Surety Company, C. C. A. 2, 1962, 297 F. 2d 665**, that Court held:

> "Every subcontractor and materialman not reimbursed for work done under a contract is given an unqualified right to sue on the payment bond . . . (p. 667).
>
> "The primary aim of the Miller Act was **to secure greater protection for the subcontractor.** The major changes were designed to streamline the cumbersome Heard Act machinery and **to facilitate suit** by those supplying labor or materials to the general contractor. It would be ironic indeed to find in those amendments a provision which in today's world would scuttle a major part of the bonding scheme. For that would be the result of accepting defendant's construction: **with no forum for enforcement, the bond becomes an empty gesture, a stately farce carried out by contractors and sureties, at the public expense, and to the detriment of the very class the Miller Act was designed to protect.** We cannot accept a construction which would lead to such a result . . .
>
> ". . . **the purpose of the Miller Act was clearly to provide a forum for all unpaid subcontractors" (pp. 668-669).** (Emphasis supplied.)

The clear and strong language of this Court and of the Court of Appeals for the Second Circuit shows unmistakably that the primary purpose of the Miller Act is to protect subcontractors and others whose work and labor has gone into the public work, and that the changes which the Miller Act made in its predecessor, the Heard Act, were specifically designed by Congress to make it easier for such subcontractors and others to recover sums owed to them by defaulting general contractors, and to provide a forum in which they could sue. But the Act went much further. It not only provided the forum; it went on to

provide an absolute right to such unpaid subcontractor or materialman "to prosecute said action to final execution and judgment for the sum or sums justly due him."

3. **Substitution of arbitration at a distant place for a suit in the United States Court for the district in which the work was performed substantially destroys the right granted by Congress.**

The majority opinion of the Court of Appeals held that "the appellee will not be deprived of any substantial right if it is forced to comply with its voluntarily assumed obligation to arbitrate in New York City" (R. 128).

That holding is in direct conflict with a decision of this Court which pointed out the very substantial differences in the substantive rights of the parties which may result from proceeding by arbitration rather than in the United States District Court in the District in which the work was performed, as the statute provides.

In Bernhardt v. Polygraphic Company, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, this Court said (p. 203):

> "For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action . . . . The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate results. Arbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment . . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in **Wilko v. Swan, 346 U. S. 427, 435-438, 98 L. Ed. 168, 175-177, 74 S. Ct. 182**".

This Court had already had occasion to point out the detrimental effort upon the cause of action itself which may result from having to proceed by arbitration rather than by suit in a court in Wilko v. Swan, cited in the above quotation, where this Court held void an agreement to arbitrate any controversy which was contained in a margin agreement for the purchase of securities. In so holding this Court reversed a decision of the Court of Appeals for the Second Circuit in **Wilko v. Swan**, 201 F. 2d 439, which had held at p. 444: "We think that the remedy a statute provides for violation of the statutory right it created may be sought not only in any 'court of competent jurisdiction' but also in any other competent tribunal such as arbitration . . ."

In the Wilko case this Court pointed out that the attempted waiver of the right to sue and the substitution of arbitration was contained in an agreement executed before the cause of action under the statute arose and that the security buyer "thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary" (p. 435).

That same observation is true in the instant case. The purported agreement that any controversy or claim shall be settled by arbitration is contained in the subcontract itself which of course was executed before any work was done. Thus it is an attempt to waive in advance the right given by the Miller Act to sue and to prosecute the action to final execution and judgment if the subcontractor is not paid by the prime contractor.

The language of this Court in the Wilko case is even more applicable to the Miller Act than to the Securities Act. Rather than surrendering one of the advantages which the Act gives him, as was said by this Court of the Security buyer in the Wilko case, a subcontractor purport-

ing to agree in advance to settle any claim by arbitration surrenders **every** right which the Miller Act gives him, and completely nullifies its intended benefits.

The detrimental effect upon the rights of petitioner which would result from the staying of this suit to enforce unwilling arbitration is well pointed out by the dissenting opinion of Judge Rives, of the Circuit Court of Appeals for the Fifth Circuit where he says:

> "The propriety of extending its protection to the plaintiffs is shown by the observation of the District Court; 'the instant case strikingly demonstrates the purpose of Congress in thus providing an exclusive venue, and, it is believed, an exclusive forum for the resolution of Miller Act disputes. The inherent inconvenience and injustice of Moseley's being forced to transport himself, his records, and his witnesses from the scene of the activities under investigation to a point so distant as New York City is from Macon, Georgia is readily apparent.'
>
> "The prime contractor is in peculiarly favorable position to impose upon those who would enter into subcontracts with him burdensome agreements as to arbitration. The number of subcontractors from which the prime contractor may choose is limited only by the scope of the industry, while would-be subcontractors must seek the nod of a single prime contractor, who is in that respect a complete monopolist (R. 133-134).
>
> ". . . The holding of the majority in the present case places it within the power of prime contractors to insist upon agreements for arbitration which might well nigh nullify the beneficent provisions of the Miller Act. That is not conducive to the efficient, economical and just performance of government contracts. So thinking, I respectfully dissent" (R. 135-136).

4. The specific purpose and intent of Congress unequivocally expressed in the Miller Act would be thwarted by staying a suit by an unpaid subcontractor to force unwilling arbitration.

It having been so clearly held by decisions of this Court that a right granted by Congress in the public interest may not be destroyed by obtaining a waiver or release of the right or the remedy in advance of the accrual of the right, that the Miller Act was specifically designed to protect those furnishing labor and material in the performance of government contracts and to furnish a forum in which they might sue to enforce the rights granted for their protection under the Act, and that substitution of arbitration for a suit in the United States Court substantially affects the cause of action, then a mere reading of the language of the Miller Act demonstrates beyond any question that enforcement of the fine print provisions of a subcontract prepared by a prime contractor purporting to take away the right of the subcontractor to sue in the United States Court would thwart the purpose of Congress.

There is no question that petitioner is one of the class for whose protection the Miller Act was passed. He is a "person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Sec. 270 a of this title and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made."

The Act says of such person that he "shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and **to prosecute such action to final execution**

and judgment for the sum or sums justly due him" (Emphasis supplied).

No more positive words could have been chosen by Congress to evidence its purpose than an unpaid subcontractor should have a right to sue on the bond and to carry the suit on to a final conclusion, without having it stayed for arbitration or any other purpose.

The unqualified right "to prosecute said action to final execution and judgment" completely excludes the possibility of such action being stayed. To sue and to prosecute an action to final execution and judgment is the exact opposite of suing and not prosecuting, but having the suit stayed.

Black's Law Dictionary (4th ed.), p. 1385, defines "prosecute" as follows:

> "**To follow up; to carry on** an action or other judicial proceeding; to proceed against a person criminally. To 'prosecute' an action is **not merely to commence it, but includes following it to an ultimate** conclusion . . ." (Emphasis supplied).

The same authority, at page 1583, defines the verb "stay" as follows:

> "To stop, arrest or forbear."

It defines the noun "stay" as follows:

> "A stopping; the act of arresting a judicial proceeding by the order of a court."

Obviously then, if an action is stayed, it is not being prosecuted; it is not being carried on; it is not being followed to an ultimate conclusion.

When Congress provided that an unpaid subcontractor shall have the right to sue, and was not content to stop there, but added the words "and to prosecute said action to final execution and judgment," the added words, if

they do not clearly mean that such a suit shall not be stayed for arbitration or any other purpose, do not mean anything whatever. Surely it can not be held that Congress added these words for no purpose and with no meaning.

It should be borne in mind that the Arbitration Act, with its provision for a stay of certain types of suits, was enacted in 1925 and had been in effect for ten years when the Miller Act was enacted in 1935 with its specific, unqualified provision that an unpaid subcontractor "shall have the right to sue . . . and to prosecute said action to final execution and judgment."

Thus it is inevitable that Congress, in enacting the Miller Act with these positive provisions, had in mind the provisions of the United States Arbitration Act which, except for the specific provisions of the Miller Act deliberately inserted by Congress, might have permitted a stay of such suits if the contract for the work evidenced a transaction involving commerce.

If Congress had not intended to prevent a stay of such suits, it would not have added the words "and to prosecute said action to final execution and judgment," but would have stopped with the words "shall have the right to sue."

That the Arbitration Act does not apply to a subsequent Act of Congress showing an overriding public policy inconsistent with the provisions of the Arbitration Act is shown by the case of Wilko v. Swan, supra.

The precise question here presented has not been previously decided by this Court or by any other Circuit Court of Appeals. There are three other cases, two from the Fourth Circuit, and one from the Sixth Circuit, indicating or holding that arbitration is allowable in a Miller Act

suit, but the contention here urged was not presented to or considered by the Court in either of those cases. This fact was pointed out by the District Judge (R. 123-124), was recognized by counsel for respondents in their arguments before the Court of Appeals for the Fifth Circuit, and it is pointed out by the majority opinion of the Court of Appeals for the Fifth Circuit (R. 131).

The first of these cases, **Agostini Bros. Building Corporation v. United States, 4 Cir., 142 Fed. 2d 854,** without considering or deciding the question here presented, was decided upon the basis that the United States Arbitration Act was applicable to all contracts containing an agreement to arbitrate, and not just those dealt with in Section 2 of the Act, namely, maritime transactions and contracts evidencing a transaction involving commerce. This view of that court was the basis for the decision authorizing a stay for arbitration. Since that decision in 1944, this view, and the entire basis for that decision, has been rejected by this Court in a decision holding directly to the contrary. In **Bernhardt v. Polygraphic Co., 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199,** this Court specifically held that the stay authorized by Section 3 was applicable only to agreements for arbitration contained in the kinds of contracts specified in Section 2, namely, maritime transactions and contracts evidencing transactions involving commerce.

The next case, **United States v. Bregman Construction Corporation,** 6 Cir., 256 Fed. 2d 851, did not grant a stay although the Court, at page 853, cited the Agostini Bros. case, supra, as authority for a statement that in a proper situation the Arbitration Act applies in proceedings brought under the Miller Act.

The other case, United States v. Al Con Development Corporation, 4 Cir., 271 Fed. 2d 904, was decided upon the basis of concession by the defendants that the provisions of the Arbitration Act "are not applicable here and that,

if the lower court has the power to stay proceedings, pending arbitration, it must find that authority in the law of the State of Virginia" (p. 906). That court then proceeded to conclude that the agreement was enforceable under the state law because the agreement provided that the decision of the arbitrators "shall be a condition precedent to any right of legal action" (p. 906).

Thus, the instant decision is the only one in which any court has considered the effect of the public policy embodied in the Miller Act upon private agreements between a prime contractor and a subcontractor that any claim or dispute shall be settled by arbitration at a place many hundreds of miles from the place where the work was performed, in spite of the specific language of the Miller Act that any person who has furnished labor or material and has not been paid, "shall have the right to sue . . . and to prosecute said action to final execution and judgment . . ."

The only other case we have found in which any court has considered the validity and enforceability of contract provisions found to be at variance with the public policy declared by the Miller Act is a District Court decision in **United States v. Holloway Company**, 126 Fed. Sup. 347, where the court said (p. 348):

> "This court is of the opinion that the provisions in the contracts between the plaintiffs and the Holloway Company, to the effect no payment is to be due the subcontractor until final payment has been made by the Government to the prime contractor are contrary to the public policy to be gleaned by a reading of the Miller Act, Title 40, U. S. C. A., Section 270a, et seq. A study of this Act reveals Congress had in mind providing an efficient and speedy method whereby those supplying labor and materials to a person having a contract with the Government of the

United States for the erection of public improvements could in the event of proper performance of the contract on their part recover by an action on a payment bond to be furnished by the prime contractor and a corporate surety, the amounts due and owing said subcontractor at the completion of the latter's performance. Reasonable periods were inserted in the Miller Act within which an action to recover under a statutory bond could be had; . . . . Any contractual deviations from the objectives of the Miller Act which cause or tend to cause unwarranted delay to good faith subcontractors are against the public policy of the Act and should not afford an escape to those prime contractors who have secured insertion of the above covenants in contracts between them and subcontractors."

The opinion of the District Judge and the dissenting opinion of Judge Rives in the instant case effectively point out how the arbitration provision in this case, if upheld, would substantially deprive petitioner of the cause of action granted to him by the Miller Act.

The majority opinion in this case would enable unscrupulous prime contractors to cheat and swindle local subcontractors out of amounts justly earned by them, by the insertion in the fine print of voluminous subcontracts of burdensome agreements by which they could defeat payment altogether or reduce their payments to a small fraction of what they legitimately owe by making it so difficult and expensive for the local subcontractor to obtain payment that he will settle his claim for a small fraction of its real value. **That is exactly what has happened in this case**, according to the allegations of the complaint.

If petitioner is not permitted to maintain his suit, then, since he unquestionably can not properly present his claim in an arbitration proceeding in New York City, many

hundreds of miles from the Middle District of Georgia where the work was performed, the witnesses reside, and the government records are maintained, petitioner will be absolutely deprived of the benefits of the bond which the prime contractor was required to give for his protection.

In that situation the language of the Court of Appeals for the Second Circuit in United States v. Aetna Casualty and Surety Company, supra, would be most apt, where they said:

> "With no forum for enforcement, the bond becomes an empty gesture, a stately farce carried out by contractors and sureties, at the public expense, and to the detriment of the very class the Miller Act was designed to protect."

5. **The United States Arbitration Act is not applicable.**

It is petitioner's earnest contention that the Arbitration Act is not applicable for the reason that the subcontract in this case is not a "contract evidencing a transaction involving commerce" within the meaning of that Act.

It clearly appears from the record in this case that the prime contract involved entirely new construction of buildings and other facilities upon land which had been previously open farm land or forest (R. 74-75), that after completion of all of the construction required by the contract nothing was produced which became a part of any existing facility engaged in commerce (R. 76-77), but that a great deal of work and installation of equipment remained to be done by the Army (R. 77-78), the additional work and equipment involving an expenditure by the Army of twenty-eight million dollars (R. 97-98).

Under these undisputed facts the decision of this Court in **Murphy v. Reid, 335 U. S. 865, 69 S. Ct. 105, 33 L. Ed. 410** requires a holding that the subcontract in this case

was not a contract evidencing a transaction involving commerce, and the Arbitration Act is for that reason not applicable.

It was clearly held in **Bernhardt v. Polygraphic Co., 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199,** that the stay authorized by Section 3 of the Arbitration Act is applicable only to agreements for arbitration contained in the kinds of contracts specified in Section 2, namely maritime transactions and contracts evidencing transactions involving commerce.

Although this Court in **Mitchell v. C. W. Vollmer and Co.,** 349 U. S. 427, 75 S. Ct. 860, 99 L. Ed. 1196, and **Mitchell v. Lublin McGaughy and Associates, 358 U. S. 207, 79 S. Ct. 260, 3 L. Ed. 2d 243,** held the Fair Labor Standards Act applicable to construction which consists of repair of existing facilities already a part of commerce or an improvement to such facilities by adding other things to an existing facility which will enable it to operate more effectively, this Court has not extended even that act to construction of the type here involved, entirely new construction, which even after it was fully completed, did not become a part of any existing facility already engaged in commerce, but merely provided the bare building construction which was turned over to the Army which itself then had to perform labor and furnish material at a value of $28,800,000.00 before these Nike-Hercules bases could become a part of an existing defense system.

Furthermore, the Fair Labor Standards Act is much broader in its definition of commerce than is the meaning of that word as used in the Arbitration Act. The Fair Labor Standards Act defines commerce as "trade, commerce, **transportation, transmission or communication** among the several states" (Emphasis supplied).

The Arbitration Act by Sec. 2 applies only to a maritime transaction or "a contract evidencing a **transaction involving commerce**."

Therefore, under the Arbitration Act, it is not sufficient that the construction have an effect upon commerce, but the construction itself which the contract governs must be "a transaction involving commerce".

Thus, it would not have been sufficient even if the construction after it had been completed had become a part of a facility which was itself engaged in commerce, as would have been sufficient under the Fair Labor Standards Act. The particular transaction, the construction, must **involve commerce**.

Even, however, if this Court should conclude that the subcontract in this case was a contract evidencing a transaction involving commerce, and that the Arbitration Act would otherwise be applicable, it clearly cannot be applied so as to defeat the express purpose of Congress in enacting the Miller Act. The effect of its application would be to completely eliminate from the Miller Act the words chosen by Congress to guarantee that an unpaid subcontractor should have not only the right to sue but the right "to prosecute said action to final execution and judgment".

CONCLUSION.

The Court will observe from reading the voluminous subcontract which covers 34 pages in the record (R. 17-50), and which was in fine print, as signed by the parties (covering only 13 pages), that it represents a studied effort in its myriad paragraphs and subparagraphs to impose all kinds of burdensome obligations and agreements upon the subcontractor. Substantially every paragraph begins with the words "the subcontractor shall," "the subcontractor agrees," or words of similar import. The only paragraph in the whole contract in which the prime contractor agrees

to do anything is that paragraph denominated "payment" (R. 32), whereunder the prime contractor agrees to pay the contract price, but even that provision is hedged by various conditions, exceptions, limitations and reservations contained in the main paragraph and nine subparagraphs. It is alleged in the complaint that this contractor entered into the subcontract with the fraudulent intention of not performing its sole obligation under the contract, that is, payment to petitioner for the work done by him. It is alleged that the contractor conceived and carried out a fraudulent scheme to obtain a great amount of work and material from petitioner without paying therefor and to browbeat petitioner and other subcontractors into accepting much less than the real value of their claims, and that one of the means by which respondent contractor intended to carry out this fraudulent scheme was by use of the provision of the subcontract purporting to require any claim to be settled by arbitration in New York, the contractor knowing and intending that petitioner and other subcontractors would not be able to properly present their claims in an arbitration proceeding at such a distant point as New York City is from the Middle District of Georgia, and that therefore respondent would be able to have allowed in such proceeding all of its false and fraudulent claims that petitioner is not entitled to additional compensation for work done by him at respondent's direction, which was not covered by the subcontract and the many false and fraudulent back charges by respondent against petitioner.

Thus under the allegations of the complaint the respondent contractor has devised a scheme by which it seeks to completely nullify the specific provisions of the Miller Act that an unpaid subcontractor shall have the right to sue in the United States District Court in the district in which the work was performed, and the even more explicit right to prosecute such action to final execution and judgment. Respondent contractor seeks to substitute arbitration as

the exclusive remedy provided by the contractor instead of the prosecution to final execution and judgment of a suit on the bond as the exclusive remedy provided by Congress in the Act. Respondent contractor thus obviously seeks to thwart the purpose of Congress and seeks to do so for the purpose of carrying to completion its fraudulent and illegal scheme to obtain work and labor for which it is paid by the United States of America without itself having to pay therefor.

To apply the Arbitration Act in these circumstances would have the effect of assisting respondent contractor in perpetrating its fraudulent scheme. It would have the effect of removing from the Miller Act the words "shall have the right to prosecute such action to final execution and judgment," deliberately inserted by Congress. This would result in a defeat of the Congressional intent which this Court said in MacEvoy v. United States, supra, was "to remove the procedural difficulties . . . and thereby make it easier for unpaid creditors to realize the benefit of the bond."

We respectfully submit that the judgment of the Court of Appeals for the Fifth Circuit should be reversed and direction given to affirm the judgment of the District Court denying a stay and continuing the injunction against the arbitration proceedings.

Respectfully submitted,

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APPENDIX.

Provisions of the United States Arbitration Act.

As set out in 9 U. S. C., Secs. 1, 2 and 3.

1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. Validity, irrevocability and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

NO. 401

UNITED STATES OF AMERICA
for the use of H. W. MOSELEY, d/b/a MOSELEY PLUMBING AND HEATING COMPANY,
Petitioner

v.

ELECTRONIC & MISSILE FACILITIES, INC., formerly FIVE BORO CONSTRUCTION CORPORATION, and CONTINENTAL CASUALTY COMPANY,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, is reported at 306 F. 2d 554 and appears in the record at pages 125-136. The opinion of the District Court is contained in the record at pages 120-124.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1). Certiorari was granted December 3, 1962.

STATUTES INVOLVED

The questions presented involve the United States Arbitration Act (9 USCA, Sections 1, 2 and 3), and the venue provision of the Miller Act (40 USCA 270-b).

Section 1 of the Arbitration Act makes the Act applicable to transactions involving "commerce among the several states." Section 2 of the Arbitration Act provides that in a "contract evidencing a transaction involving commerce" agreements to arbitrate "shall be valid, irrevocable and enforceable." Section 3 of the Arbitration Act provides for the granting of a stay "if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration."

The three sections of the Arbitration Act involved are set out in their entirety in Appendix "A" to this brief.

The provision of the Miller Act in question provides that a person furnishing labor or material in the prosecution of certain government projects "shall have the right to sue on such payment bond . . . and to prosecute said action to final execution and judgment . . . Every suit instituted under this section shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed, and not elsewhere . . ."

Section 2 of the Miller Act (40 USCA 270-b) is set out in its entirety in Appendix "B" to this brief.

QUESTIONS PRESENTED

Basically, three questions are presented: (1) Does the venue or jurisdictional provision of the Miller Act (40 USCA 270-b) repeal by implication the United States

Arbitration Act (9 USCA 1-3), with respect to Miller Act transactions;

(2) Do the contracts upon which petitioner's action is based evidence a transaction involving commerce within the meaning of the United States Arbitration Act; and

(3) Do petitioner's other contentions raise any substantial federal issue not correctly decided by the Court of Appeals.

STATEMENT OF FACTS

The original complaint in this case was brought under the Miller Act, Title 40, USCA 270 (a-d). The facts are that the respondent, Electronic & Missile Facilities, Inc., formerly Five Boro Construction Corporation, bonded by respondent, Continental Casualty Company, (both of whom will be referred to as "respondent"), was prime contractor with the United States Government for the construction of Nike Hercules Facilities at Robins Air Force Base and Turner Air Force Base within the Middle District of Georgia. Petitioner, as a subcontractor of respondent assumed under two written subcontracts a certain portion of the work, including the plumbing, heating and air conditioning. (R. 17)

The complaint which sought to recover approximately One Hundred Twenty-five Thousand ($125,000.00) Dollars (in addition to approximately $405,000.00 which had already been paid) was brought in six counts for breach of two written subcontracts attached to the complaint as exhibits. One subcontract covers the work to be performed at Robins Air Force Base and the other subcontract covers the work to be performed at Turner Air Force Base. The provisions of the two subcontracts are identical, except as to amounts and location, and by

stipulation of the parties may be treated as a single instrument. (R. 50-51)

The various counts of the complaint each alleged that petitioner had fully completed his work and that respondent had instituted arbitration proceedings under the terms of the subcontracts which would require petitioner to arbitrate the dispute over sums alleged to be due petitioner under the subcontracts; and that such arbitration should be restrained by the court in order to allow petitioner to prosecute his claim within the Middle District of Georgia. In the alternative, petitioner sought to rescind the contracts for fraud. (R. 1-17)

Respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, and in lieu thereof, moved to stay the proceedings until arbitration could be had in accordance with the express terms and conditions of the subcontracts sued upon. (R. 57)

The case came on for a hearing upon the motion filed by respondent and based upon the pleadings and the depositions and affidavits on file in the case. Such motion was overruled and denied by the District Court on each and every ground, and an existing restraining order preventing arbitration was continued in full force and effect. (R. 120-124)

On appeal the United States Court of Appeals for the Fifth Circuit reversed the order of the trial court and remanded the case to the District Court with direction that the proceedings be stayed for the purpose of arbitration in accordance with the terms of the subcontracts sued upon. (R. 125-136)

SUMMARY OF ARGUMENT

1.

Congress has not indicated any intention to prohibit arbitration of Miller Act cases, because: (1) The two Acts, when construed together, are in perfect harmony. (2) To hold otherwise would work an implied repeal of the Arbitration Act; (3) By legislative history, the venue provisions of the Miller Act are for the benefit of prime contractors and their sureties; (4) This court has held that similar venue provisions may be waived by the parties and do not prevent arbitration; (5) The district court does not lose its jurisdiction in arbitration cases but merely stays its action while arbitration is taking place; (6) There are substantial physical precedents in favor of arbitration and no conflict exists in the decisions of the Circuit Court of Appeals as to the arbitrability of Miller Act cases; and (7) According to a previous decision of this court a Miller Act case is one peculiarly suited for arbitration.

2.

(1) The work to be performed under the present contract evidences a transaction in commerce under the provisions of the United States Arbitration Act, and (2) Where citizens of different states contract to send supervisory personnel across state lines and receive equipment and supplies across state lines, thereby fulfilling a contract for improvements and additions to a military facility already an integral part of a system in commerce, a finding that the transaction is one involving commerce is demanded under previous decisions of this court.

3.

(1) Petitioner's allegations of fraud are insufficient:

(2) By the United States Arbitration Act, contracts to arbitrate become "valid, irrevocable and enforceable", and arbitration is not barred by a general attack alleging fraud, absent an allegation or specific claim that the arbitration provision itself was induced by fraud; and (3) The record demonstrates that petitioner is barred by an election of remedies, he being bound by his decision to proceed on his contract rather than to rescind.

ARGUMENT AND CITATION OF AUTHORITY

I.

Congress did not intend to prohibit arbitration of Miller Act cases.

The contention of petitioner is that no Miller Act suit can be arbitrated and that as to Miller Act suits the United States Arbitration Act has been impliedly repealed. There is nothing in the two Acts themselves which justifies this conclusion and if it is to be drawn it must be found in their legislative history.

The Miller Act came into being in 1935 as a modification of the Heard Act. The Heard Act[1] was originally enacted by Congress to protect the United States Government from defaulting contractors and at the same time to protect suppliers of labor and material from the same eventuality. It is evident from the provisions of the Heard Act that the primary purpose of the Act was the protection of the United States Government. Since the government was compelled to accept the lowest bid, it had no way of selecting only solvent contractors and as a consequence it had no assurance that the contract would be completed, hence, the provisions of the Heard

[1]Act of August 13, 1894, Ch. 280, 28 Stat. 278.

Act requiring a bond in favor of the government conditioned on faithful performance. Collateral to such provision was the further provision that in the event of default the government would bring one suit and unpaid suppliers of labor and material might intervene and recover pro rata their unpaid bills *after* the government had been paid. Since there was but one suit, and for the convenience of everybody, the Heard Act provided that the one suit be brought in the district where the work was performed.

The Heard Act was defective for the reason that unpaid suppliers had to wait, sometimes years, until the government brought its suit, and thus Congress in 1935 enacted the Miller Act. Only two substantial changes were made, the first being the provision that two bonds would be required, one a performance bond in favor of the government and the other a payment bond in favor of subcontractors and materialmen; and, second, the provision whereby unpaid materialmen and laborers might bring a separate suit if they were not paid within ninety days from the date they supplied the last labor and material. In the course of the House Committee hearings,[2] the surety companies argued that the single suit system should be continued so that they might be protected from paying out more than the limits of their bonds, since with separate suits being maintained in many jurisdictions they would be hard pressed to determine the status of payments in relation to the total amount of their bonds. To prevent this, the Miller Act as finally enacted retained the former provision of the Heard Act that all actions would be brought in a district where the

[2]Bonds of Contractors on Public Works, Hearings before the Subcommittee on the Judiciary, 74th Cong., 1st Sess., Serial 4, Mar. 8, 22, Apr. 26, May 3, 1935, pp. 47-48.

work was performed, and as pointed out by the Second Circuit Court of Appeals in the case of *United States* v. *Aetna Casualty and Surety Company*, 2d Cir., 297 F. 2d 665, the venue section of the Miller Act retained "scant utility save as a convenience to the defendants."

It is not disputed that the Miller Act is highly remedial in nature and entitled to a liberal construction and application. It appears, however, that petitioner has obviously confused the relative position occupied by a supplier of labor or material unprotected by a contract with the prime contractor, with that of a subcontractor operating under a written subcontract entered into with the prime contractor. In the former case, a supplier of labor or material must rely on the provisions of the Miller Act to furnish him the same protection ordinarily furnished by the lien laws of the various states. The subcontractor, on the other hand, while nevertheless protected by the bond of the prime contractor, enjoys a direct contractual relationship with the prime contractor. As to such a subcontractor, therefore, there appears to be no valid reason to prevent him from entering into a subcontract with the prime contractor providing that disputes between them over amounts of money due shall be subject to arbitration.

Clearly, in enacting the United States Arbitration Act, the Congress intended and did announce a federal policy in favor of arbitration of disputes, and to hold that the present case is not subject to arbitration would clearly amount to an implied repeal of the Arbitration Act. No such implied repeal can be shown or inferred by the terms of the Miller Act or by its legislative history. Moreover, the opinion of the Court of Appeals in holding the Arbitration Act applicable in this case is consistent

with numerous decisions of this court holding that, "It is a cardinal principle of construction that repeals by implication are not favored. . . . The intention of the legislature to repeal 'must be clear and manifest.' . . . It is not sufficient . . . 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old.' " *Rosenberg* v. *United States*, 346, U. S. 371, 73 S. Ct. 1152, 97 L. Ed. 1607, 1619; citing *United States* v. *Borden Company*, 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181, 190.

2.

The provision of the Miller Act that suit be brought in the District Court where the work is performed relates to venue only and does not prevent arbitration.

The provision of the Miller Act requiring suit to be brought "in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere"[3] does not prevent arbitration. That such a provision merely relates to venue and does not constitute an integral and indispensable part of any right created by the Miller Act would appear to be clear from numerous cases wherein this court has been called upon to decide whether federal statutes requiring actions to be brought in a certain district relate to jurisdiction or venue.

In the case of *J. W. Lee* v. *Chesapeake and Ohio Railroad Company*, 260 U. S. 653, 67 L. Ed. 443, this court

[3] 40 USCA 270 (b).

construed 28 USCA 1391 (formerly Section 51 of the Judicial Code), which provides that a diversity action may be brought *only* in the district of residence of either the plaintiff or the defendant, and held that such requirement does not limit the jurisdiction of the district courts, but merely confers a personal privilege on the defendant, which he may assert or waive, at his election.

To the same effect are numerous other decisions of this court giving a venue construction to statutes rather than holding them jurisdictional, for example:

28 USCA 1402 (The Tucker Act), providing that suits against the United States of America shall be brought *only* in the district where the plaintiff resides, has been held by this court to be a mere venue provision; *United States* v. *Hvoslef*, 237 U. S. 1, 59 L. Ed. 813, 35 S. Ct. 459.

15 USCA 15 (The Clayton Act), which requires that a suit may be brought in the district "in which the defendant resides or is found or has an agent," has been held by this court to be a mere venue requirement; *Freeman* v. *Bee Machine Company*, 319 U. S. 448, 87 L. Ed. 1509, 63 S. Ct. 1146.

46 USCA 742 (suits in Admiralty Act), providing that libel in personam be brought against the United States and other defendants in a district wherein the plaintiff resides or the vessel is found, has been held by this court to be a venue provision; *Hoiness* v. *United States*, 335 U. S. 297, 93 L. Ed. 16, 69 S. Ct. 70.

46 USCA 688 (Merchant Marine Act), providing that the action of a seaman against his employer "shall be in the court of the district in which the defendant employer resides or in which its principal office is located," has been held to be a mere venue provision

Panama R. Co. v. *Johnson*, 264 U. S. 375, 68 L. Ed. 748, 44 S. Ct. 391.

While there are numerous other similar holdings by this court, there would be no point in merely compiling an exhaustive list. Although there is no decision of this court directly on point in Miller Act cases, the Courts of Appeal for two circuits have decided the question.

In the case of *Texas Construction Company* v. *United States of America for the use of Caldwell Foundry and Machine Company* (5th Cir.), 236 F. 2d 138, 143, the Court of Appeals for the Fifth Circuit held that:

> "... the requirement as to the district in which suit may be filed, contained in the Miller Act, is only one for the benefit of the defendants and may thus be waived by them, as may any other question of venue."

In the case of *Indemnity Insurance Company of North America* v. *United States of America for the use and benefit of Bailey-Lewis-Williams of Florida, Inc.*, 299 F. 2d 920, the Court of Appeals for the District of Columbia affirmed a judgment of the District Court for the District of Columbia (195 F. Sup. 752) and adopted the finding of the district court to the effect that the venue provision of the Miller Act confers a personal privilege on the defendant, who, at his election, may assert it or waive it.

While the two Court of Appeal decisions above cited would have no controlling effect on this court, they are well reasoned and persuasive.

Nothing to the contrary can be found in the cases cited by petitioner. Petitioner cites two cases arising under the Federal Employers Liability Act (*Boyd* v. *Grand Trunk Western Railroad Company*, 338 U. S. 263, 70 S.

Ct. 26, 94 L. Ed. 55; and *Pope* v. *Atlantic Coastline Railroad Company*, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094) as authority for the proposition that the provision of the Miller Act is jurisdictional and can not be waived. These cases are clearly distinguishable by the language of the Federal Employers Liability Act which contains an express "non-waiver" provision declaring void any "contract, rule, regulation or devise whatsoever, the intent or purpose of which shall be to enable any common carrier to exempt itself from any liability created by this Act."[4] Because of this specific non-waiver provision, this Court held in the *Grand Trunk Western Railroad Company* case, supra, that an agreement which had the effect of depriving a claimant of his rights under the Act was void; and in the *Atlantic Coastline Railroad Company* case, supra, that a Georgia court did not have the right to deprive a claimant resident of that state from maintaining a suit in a foreign state.

Equally distinguishable, and on the same basis, is the case of *Wilko* v. *Swan*, 346 U. S. 427, 74 S. Ct. 182, 98 L. Ed. 168, cited by petitioner in support of the same proposition. In that case this court, in interpreting the Securities Act of 1933, held void a contract signed by the customer of a securities house wherein he waived his right to sue, for the reason that the Securities Act of 1933 declared void any "condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision"[5] of the Act.

The Miller Act contains no such provision.

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[4]Federal Employers Liability Act, 45 USCA 55.
[5]Securities Act of 1933, 15 USCA 77 n.

3.

The decision of the Court of Appeals is in harmony with previous decisions of this Court.

In the case of *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 499, 55 S. Ct. 313, 79 L. Ed. 583, this court quoted with approval the opinion of Judge Learned Hand, wherein Judge Hand said:

"We see no reason for a limited construction (of the United States Arbitration Act) and conclude that Section 3 (the section of the Act authorizing a stay of proceedings) authorizes a stay even though the arbitration must take place beyond the jurisdiction of the court." (*Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 2nd Cir., 70 F. 2d 297)

That there is no jurisdictional conflict between the Arbitration Act and the Miller Act can also be demonstrated by the very language of the Arbitration Act. The Act does not provide that the federal court shall lose jurisdiction, but that the further exercise of such jurisdiction shall merely be stayed pending arbitration. Manifestly, therefore, a proper construction of the two Acts would appear to be that if the suit be brought within a district in which the contract was performed, as required by the provisions of the Miller Act, either party may move for a stay of the action in accordance with the provisions of the Arbitration Act, and the parties to the contract may then arbitrate in accordance with the contract entered into by both and at any place where both had agreed to so arbitrate, but finally and at last, the judgment of the arbitrators would be entered in proceedings in the original district court action. Such construction harmonizes the two acts and yet does not deprive either

party of the right to a judicial challenge of any errors in arbitration. Both parties to the contract would be able to attack in the District Court any irregularity which occurred in the arbitration proceedings.

Nothing held by this court in *Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, relied upon by petitioner, is contrary to this reasoning. In the *Bernhardt* case this court simply held that Section 3 of the Arbitration Act was applicable only to agreements for arbitration in maritime transactions and contracts evidencing transactions in commerce. In the *Bernhardt* case jurisdiction was not based upon a federal question but on diversity of citizenship, and this court held, therefore, that under the mandate of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the right to arbitrate would depend on local law rather than federal law, the parties not being engaged in commerce nor in a maritime transaction.

4.

The decision of the Court of Appeals is in harmony with decisions of other Circuit Courts and no conflict exists.

Although petitioner says that the present case is in conflict with the decisions of other circuit courts, he cites no authority and, it is respectfully submitted, no conflict exists. On the contrary, the circuit courts have uniformly recognized the arbitrability of Miller Act cases.

In at least three Miller Act cases, *United States* v. *Bregman Construction Corporation*, 6th Cir., 256 F. 2d 851; *United States* v. *Al Con Development Corporation*, 4th Cir., 271 F. 2d 904; and *Agostini Bros. Building*

Corporation v. *United States*, 4th Cir., 142 F. 2d 854, other circuit courts have indicated that arbitration is allowable in a Miller Act case. While admittedly these cases are not controlling and do not squarely raise the point, they are certainly physical precedents, and significantly enough in the *Bregman* case the court categorically held that "without question, in a proper situation, the Arbitration Act applies in proceedings under the Miller Act."

5.

A Miller Act case is peculiarly suited to arbitration.

The Court of Appeals in its opinion in this case observed that if it could be shown that disputes arising under the Miller Act involved "complicated and sophisticated legal issues which can not readily be resolved by arbitrators untrained in the law," then perhaps some merit might be found in petitioner's argument that Miller Act suits are not subject to arbitration. It is interesting to note that this court in the case of *Wilko* v. *Swan*, supra, listed, as illustrating a situation peculiarly suited to arbitration, a case where "the amount of money due under a contract" was involved,[6] and cited *Agostini Bros. Bldg. Corp.* v. *United States*, supra, a case decided by the Fourth Circuit wherein a Miller Act suit was arbitrated. The case at bar, as do virtually all Miller Act cases, turns primarily on "the amount of money due under a contract," and would therefore appear to be, as this court says, one peculiarly suited for arbitration.

[6]Wilko v. Swan, 346 U.S. 427, 436; 74 S. Ct. 182; 98 L. Ed. 168, 176

6.

The contract in question evidences a transaction involving commerce.

The Court of Appeals held, and it is undisputed in the record, that "a New York corporation contracted with appellee, a Georgia corporation, to do the work within the State of Georgia; that appellant sent substantial supervisory personnel across the state lines, and received supplies and equipment across state lines. Working on the projects were subcontractors from states other than Georgia. Moreover, the facility involved is an integral part of a transcontinental system joined and holding hands with facilities already in commerce in other states and countries by radio and telephone communications, and further joined with numerous other military bases already in commerce from almost the North Pole to Puerto Rico forming a single giant network of air bases and communication facilities." (R. 127, Footnote 3)

Contrary to the argument advanced by petitioner, this court rejected the theory that a war instrument is excluded from interstate commerce in the case of *Powell* v. *United States Cartridge Company*, 339 U. S. 497, 94 L. Ed. 1017. This court has also rejected the "new construction" doctrine and on at least two occasions has held that contracts involving work substantially identical to that in the case at bar involved interstate commerce. The two cases in point are *Mitchell* v. *Lublin, McGaughy & Associates, et al.*, 358 U. S. 207, 3 L. Ed. 2d 243, and *Mitchell* v. *C. W. Vollmer & Company*, 349 U. S. 427, 99 L. Ed. 1196.

In this connection see also the case of *Metro Indus-*

trial Painting Corp. et al. v. *Terminal Construction Company, Inc.*, 2nd Cir., 287 F. 2d 382, involving facts almost identical to the case at bar; and see also the case of *Goldberg, et al.* v. *Five Boro Construction Corp.*, 291 F. 2d 371, wherein the Court of Appeals for the First Circuit in a case involving respondent, Electronic & Missile Facilities, Inc. (at a time when its name was Five Boro Construction Corporation) specifically held this very company to be in commerce while engaged on a project similar in every respect to the project involved under the contracts in the case at bar.

7.

The allegations of fraud do not prevent a stay for the purpose of arbitration.

It is not disputed that petitioner completed his contract before insisting that he was entitled to rescind, and it also appears that he had before him during the course of the work all facts which might give him a right to rescind. The Court of Appeals correctly decided that "Under federal law, arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision was fraudulently procured, *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.* (2d Cir.) 271 F. 2d 402."

In the *Lawrence* v. *Devonshire* case, supra, Judge Medina, speaking for the Second Circuit, based this reasoning on the fact that the Arbitration Act "is substantive, not procedural, in character and that it encompasses questions of interpretation and construction, as well as questions of validity, revokability and enforceability of arbitration agreements affecting interstate commerce or

maritime affairs, since these two types of legal questions are inextricably intertwined." (271 F. 2d 402, 409.)

This reasoning of the Second Circuit is, in turn, soundly based on the decision of this court in *Bernhardt* v. *Polygraphic Company of America*, 350 U. S. 198 (100 L. Ed. 199), wherein this court held that arbitration, while possibly "procedural" for certain purposes, was "substantive" in cases founded solely on diversity of citizenship. Thus, there would be no constitutional basis for application of the Arbitration Act in diversity cases and state law would control. On the other hand, in the same opinion, this court held that the "stay" provisions of the Arbitration Act (Section 3) must be read together with Sections 1 and 2 (the sections making agreements to arbitrate valid, irrevocable, and enforceable) thereby holding, in effect, that the Arbitration Act is in reality a substantive federal law, constitutionally based on the commerce power. Under such reasoning, and in the absence of an allegation of fraud in the procurement of the arbitration provision, such arbitration would be irrevocable, valid and enforceable, and all other questions of fraud could be determined in the arbitration proceeding.

In the case at bar, however, it makes little difference whether this court adopts the reasoning of the Court of Appeals or whether the law of Georgia be applied on the question of fraud. Under the doctrine of election of remedies, petitioner has clearly elected to stand on the contract rather than to rescind.

While petitioner claims the right to rescind because of "fraud," even a superficial examination of his complaint and the contracts will show that every act which he seeks to designate as "fraud" is one which the orig-

inal contract, bearing petitioner's signature, expressly permits.

For example, the first allegation of fraud charged against respondent is in representing "that it was a general contractor," whereas appellant in fact "intended to and did subcontract substantially all of the work." (R. 9) How does this affect petitioner and how could it constitute fraud? Why couldn't respondent sublet the contract if it saw fit to do so? The second allegation of fraud is that respondent "inserted into its printed subcontract form provisions purporting to authorize it to require Moseley or other subcontractors to do any work whatever which they were directed by said defendant to do, regardless of whether it bore any proper relation to the work called for in the main typewritten portion of such contract." (R. 9 and 10) Is petitioner saying he didn't read this portion of the contract before he signed it? The third allegation of fraud is that the respondent gave to petitioner "numerous work directives during the course of the work contending at the time and contending now that the work called for in such directives was covered by Moseley's subcontract, whereas in truth and in fact said defendant knew such work was not so covered." (R. 10) Then why didn't petitioner refuse to do the work and seek rescission then? The next charge is that respondent "issued a large number of said work directives so as to greatly increase the amount of work to be done" by petitioner, thereby increasing his capital outlay and producing financial pressure (R. 10) upon him with the intention of forcing him to settle with appellant. Again, why didn't appellee rescind or attempt to do so at the time? Finally, it is charged that the arbitration provision was inserted in the contract by respondent in order to

"obtain working materials without paying therefor." (R. 11) If arbitration be looked upon with favor by the courts, how then can the mere insertion of an arbitration clause in a contract, whereby disputes may be settled by that method, be an act of fraud?

All of the allegations of fraud are of the same character. Without further elaboration or illustration, we simply say that none of the allegations charge anything more than a dispute over the exercise of rights either expressly authorized by the contract or which one party said were authorized and the other denied.

All of these contentions were known to the petitioner either at the signing of the contract or during the course of performance so that these charges, when coupled with the allegation that the work was thereafter completed, clearly disclose that any right to rescind which may have existed was waived by petitioner long before the present suit was filed.

Under these circumstances it is unnecessary to consider whether the complaint would have justified rescission at any time. In other words if it were conceded, as it is not, that petitioner ever had a right to rescind, the law clearly is that he lost his right to do so by failing to act promptly, leaving no doubt as to his election, and adhering to the position taken. *City and County of San Francisco* v. *Transbay Const. Co.* (9th Cir.) 134 F. 2d 468; *Barnett et al.* v. *Beggs* (8th Cir.) 208 F. 255; *Jack Mann Chevrolet Co.* v. *Associates Inv. Co.*, 125 F. 2d 778; *Pearson* v. *George*, 209 Ga. 938, 945 (77 S. E. 2d 1).

As is said in *3 Williston, Contracts*, Section 688:

> "The principle is in general that wherever a contract *not already fully performed* on either side is

continued in spite of a known excuse, the defense thereupon is lost and the injured party himself is liable if he subsequently fails to perform." (emphasis supplied)

The same principle stated in another form is that:

"The right to rescind, abrogate, or cancel a contract must be exercised promptly on discovery of the facts from which it arises; it may be waivered by continuing to treat the contract as a subsisting obligation."

— 12 *Am. Jur.* 1029, (Contracts), Sec. 447.

"The party to a contract who, after discovery or knowledge of facts which would entitle him to rescind, treats the contracts as a subsisting obligation and leads the other party to believe that the contract is still in effect waives his right to rescind."

— 12 *Am. Jur.* 1030, (Contracts), Sec. 449.

CONCLUSION

The subcontract sued on in this case (R. 17) appears to be substantially identical with those in common use on government projects and widely used in the construction trade. Its arbitration provisions as to time, place and manner are so routine as to be commonplace, and the conclusions and self-serving declarations of petitioner's original complaint raises issues which appear in virtually every construction controversy. Presumably, petitioner read the contract before it was signed, and his original complaint points out no provision of it about which he could not have informed himself before it was made. Even after he must have discovered what he now says is fraud, he elected to treat the contract as valid and sub-

sisting and continued performance without any effort to rescind.

Finally, the controversy is of a type peculiarly suited to arbitration, and if arbitration is to be refused or prohibited in such a case, then many of the salutary benefits of all arbitration agreements will be lost and the calendars of the district courts will be further congested. We respectfully submit that neither the legislative history disclosed nor the merits of petitioner's case require or justify such result.

Respectfully submitted,

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APPENDIX

A.

Provisions of the United States Arbitration Act
9 USCA Secs. 1, 2 and 3.

1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. Validity, irrevocability and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be

valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

B.

Provisions of Miller Act
40 USCA 270-b

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, that any person having direct

contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such persons did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit."